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June 24
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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS
OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY OF THE STATE,
CORRECTED TO NOVEMBER 8, 1909.

VOL. CXLV
A. D. 1909.

33

LAST FILING DATES OF REPORTED CASES:
FIRST DISTRICT, DECEMBER 21, 1908;
THIRD DISTRICT, DECEMBER 23, 1908.

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EDITED BY
W. CLYDE JONES AND KEENE H. ADDINGTON,
AUTHORS OF JONES & ADDINGTON'S SUPPLEMENTS TO
STARR & CURTIS'S ANNOTATED ILLINOIS STATUTES.

CHICAGO
CALLAGHAN & COMPANY
1909

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NO 17 1909

**Stereotyped and Printed
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DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO NOVEMBER 8, 1909.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—ALONZO K. VICKERS.....East St. Louis.

Second District—WILLIAM M. FARMER.....Vandalia.

Third District—FRANK K. DUNN.....Charleston.

Fourth District—GEORGE A. COOKE.....Aledo.

Fifth District—JOHN P. HAND.....Cambridge.

Sixth District—JAMES H. CARTWRIGHT.....Oregon.

Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Farmer is the present Chief Justice.

CLERK.

J. McCAN DAVIS, Springfield.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTERS.

W. CLYDE JONES and KEENE H. ADDINGTON, of the law firm of Jones, Addington & Ames, 134 Monroe street, Chicago.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Alfred R. Porter, Ashland Block, Chicago.

JESSE HOLDOM, Presiding Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

AXEL CHYTRAUS, Presiding Justice, Ashland Block, Chicago.

JULIAN W. MACK, Justice, Ashland Block, Chicago.

FREDERICK A. SMITH, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

GEORGE W. THOMPSON, Justice, Galesburg.

HENRY B. WILLIS, Justice, Elgin.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

JAMES S. BAUME, Presiding Justice, Galena.

OLON PHILBRICK, Justice, Champaign.

LESLIE D. PUTERBAUGH, Justice, Peoria.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1937. Hurd's Statutes, 1897, 503, Laws of 1897, 183.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Albert C. Millspaugh, Mount Vernon.

HARRY HIGBEE, Presiding Justice, Pittsfield.

WARREN W. DUNCAN, Justice, Marion.

ROBERT B. SHIRLEY, Justice, Carlinville.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows: *

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

A. W. LEWIS, Harrisburg.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

ENOCH E. NEWLIN, Robinson.

WILLIAM H. GREEN, Mt. Vernon.

JACOB R. CREIGHTON, Fairfield.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

LOUIS BERNREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

WILLIAM E. HADLEY, Collinsville.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

ALBERT M. ROSE, Louisville.

JAMES C. MCBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

WILLIAM B. SCHOLFIELD, Marshall.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

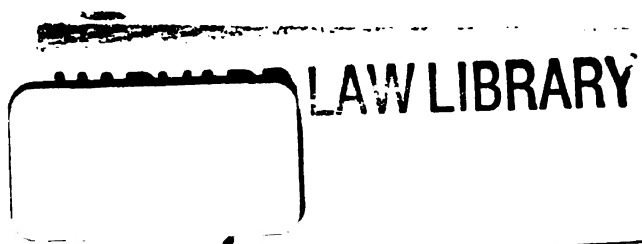
Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

WILLIAM G. COCHRAN, Sullivan.

OLON PHILBRICK, Champaign.

WILLIAM C. JOHNS, Decatur.



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(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. S. F. CONNOR, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge. EDWARD O. PETERSON, Clerk.

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. W. S. GLEASON, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

HOMER ABBOTT, Judge. EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DUQUOIN.

BENJAMIN W. POPE, Judge. HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

W. J. N. MOYERS,
M. MILLARD, Judges. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

EDWARD M. MANGAN, Judge. CHARLES S. MOTE, Clerk.

THE CITY COURT OF LITCHFIELD.

PAUL MCWILLIAMS, Judge. HARRY L. BALLARD, Clerk.

THE CITY COURT OF MATTOON.

GEORGE D. WILSON, Judge. THOMAS M. LYTLE, Clerk.

THE CITY COURT OF PANA.

JOSIAH P. HODGE, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158).

HOMER K. GALPIN, Clerk.

CHIEF JUSTICE.

HARRY OLSON.

ASSOCIATE JUDGES.

FREEMAN K. BLAKE	JOHN W. HOUSTON	HENRY C. BEITLER
WILLIAM W. MAXWELL	JOHN H. HUME	MAX EBERHARDT
JUDSON F. GOING	JOHN R. NEWCOMER	FREDERICK L. FAKE, JR.
WILLIAM N. GEMMILL	MCKENZIE CLELAND	CHARLES N. GOODNOW
WILLIAM N. COTTRELL	JOHN C. SCOVILLE	OSCAR M. TORRISON
EDWIN K. WALKER	STEPHEN A. FOSTER	HONSEA W. WELLS
EDWARD A. DICKER	FRANK CROWE	SHERIDAN E. FRY
ISIDORE H. HIMES	MANCHA BRUGGEMEYER	HUGH R. STEWART
ARNOLD HEAP	ER	JOSEPH Z. UHLIR
	MICHAEL F. GIRTEN	

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. McCRORY.....	Adams.....	Quincy.
WILLIAM S. DEWEY.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JOE A. DAVIS.....	Bureau.....	Princeton.
F. I. BIZAILLION.....	Calhoun.....	Hardin.
JOHN D. TURNBAUGH.....	Carroll.....	Mt. Carroll.
DARIUS N. WALKER.....	Cass.....	Virginia.
THOMAS J. ROTH.....	Champaign.....	Urbana.
JAMES H. MORGAN.....	Christian.....	Taylorville.
HERSHEL R. SNAVELY.....	Clark.....	Marshall.
ALSIE N. TOLLIVER.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
T. N. COFER.....	Coles.....	Charleston.
LEWIS RINAER.....	Cook.....	Chicago.
CHARLES S. CUTTING, Pro. J.	Cook.....	Chicago.
JOHN C. MAXWELL.....	Crawford.....	Robinson.
A. L. RUFFNER.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
W. J. DOLSON.....	Douglas.....	Tuscola.
CHARLES D. CLARK.....	DuPage.....	Wheaton.
WALTER S. LAMON.....	Edgar.....	Paris.
ISAAC W. IBBOTSON.....	Edwards.....	Albion.
MICHAEL O'DONNELL.....	Effingham.....	Effingham.
JOHN H. WEBB.....	Fayette.....	Vandalia.
H. H. KERR.....	Ford.....	Paxton.
T. J. MYERS.....	Franklin.....	Benton.
JOHN D. BRECKENRIDGE.....	Fulton.....	Lewistown.
W. S. PHILLIPS.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE W. HUSTON.....	Grundy.....	Morris.
JOHN M. ECKLEY.....	Hamilton.....	McLeansboro.
CHARLES A. JAMES.....	Hancock.....	Carthage.
JOHN H. FERRELL.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
ALBERT E. BERGLAND.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
PAUL WILLIAMS.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
THOMAS F. FERNS.....	Jersey.....	Jerseyville.
WILLIAM RIPPIN.....	Jo Daviess.....	Galena.
WILLIAM A. SPANN.....	Johnson.....	Vienna.
FRANK G. PLAIN.....	Kane.....	Geneva.
JOHN H. WILLIAMS, Pro. J.	Kane.....	Geneva.
ARTHUR W. DESELM.....	Kankakee.....	Kankakee.
GEORGE MCWHIRTER.....	Kendall.....	Yorkville.
R. C. RICE.....	Knox.....	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake.....	Waukegan.
WILLIAM H. HINEBAUGH.....	La Salle.....	Ottawa.
ALBERT T. LARDIN, Pro. J.....	La Salle.....	Ottawa.
JASPER A. BENSON.....	Lawrence.....	Lawrenceville.
ROBERT H. SCOTT.....	Lee.....	Dixon.
ULYSSES W. LOUDERBACK.....	Livingston.....	Pontiac.
DONALD MCCORMICK.....	Logan.....	Lincoln.
ORPHEUS W. SMITH.....	Macon.....	Decatur.
JOHN B. VAUGHN.....	Macoupin.....	Carlinville.
JOHN E. HILLSKOTTER.....	Madison.....	Edwardsville.
JOHN S. STONECIPHER.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
ROLLAND A. RUSSELL.....	McLean.....	Bloomington.
GEORGE B. WATKINS.....	Menard.....	Petersburg.
HENRY E. BURGESS.....	Mercer.....	Aledo.
LOUIS ARNS.....	Monroe.....	Waterloo.
JOHN L. DRYER.....	Montgomery.....	Hillsboro.
FRANCIS E. BALDWIN.....	Morgan.....	Jacksonville.
E. D. HUTCHINSON.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
WILBERT I. SLEMMONS.....	Peoria.....	Peoria.
LEANDER O. EAGLETON, Pro. J.....	Peoria.....	Peoria.
MARION C. COOK.....	Perry.....	Pinckneyville.
ELIM J. HAWBAKER.....	Piatt.....	Monticello.
PAUL F. GROTE.....	Pike.....	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope.....	Golconda.
LYMAN G. CASTER.....	Pulaski.....	Mound City.
HENRY C. MILLS.....	Putnam.....	Hennepin.
S. LOVEJOY TAYLOR.....	Randolph.....	Chester.
JOHN A. MACNEIL.....	Richland.....	Olney.
ROBT. W. OLMSTED.....	Rock Island.....	Rock Island.
ALBERT E. SOMERS.....	Saline.....	Harrisburg.
G. W. MURRAY.....	Sangamon.....	Springfield.
HENRY A. STEVENS, Pro. J.....	Sangamon.....	Springfield.
WM. H. DIETERICH.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
J. K. P. GRIDER.....	Shelby.....	Shelbyville.
BRADFORD F. THOMPSON.....	Stark.....	Toulon.
JOHN B. HAY.....	St. Clair.....	Pelleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ANTHONY J. CLARITY.....	Stephenson.....	Freeport.
JESSE BLACK, JR.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
LAWRENCE T. ALLEN.....	Vermilion.....	Danville.
JOHN A. LOPP.....	Wabash.....	Mt. Carmel.
J. W. CLENDENIN.....	Warren.....	Monmouth.
VACANCY.....	Washington.....	Nashville.
JOHN R. HOLT.....	Wayne.....	Fairfield.
JULIUS C. KERN.....	White.....	Carroll.
HENRY C. WARD.....	Whiteside.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
LOUIS M. RECKHOW.....	Winnebago.....	Rockford.
JOHN F. BOSWORTH.....	Woodford.....	Eureka.

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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1908.

**John G. Kircher, Plaintiff in Error, v. M. Keating &
Sons Company et al., Defendants in Error.**

Gen. No. 12,908.

1. **APPEALS AND ERRORS**—*effect of joinder in error.* Joining in error waives irregularities in suing out a writ of error.

2. **APPEALS AND ERRORS**—*status of "unknown owner."* A party joined in an action not by name but as an "unknown owner" may prosecute a writ of error in his own name.

3. **SERVICE BY PUBLICATION**—*when affidavit as to "unknown owners" insufficient.* An affidavit as to "unknown owners" is insufficient which, first, instead of saying that the defendants cannot be found, states that the name or names of said persons cannot be found, and second, instead of saying that the place of residence of the defendants is not known and that upon "diligent inquiry", as required by statute, "their places of residence cannot be ascertained", states that on "due inquiry" the place or places of residence cannot be ascertained.

4. **SERVICE BY PUBLICATION**—*how statutory procedure must be followed.* In order to confer jurisdiction upon "unknown owners" by publication the statutory procedure must be observed and followed exactly.

5. **MECHANIC'S LIENS**—*when do not affect encumbrances.* Trust deeds securing loans made and recorded prior to the making of contracts by the owner for the improvement of the property covered by such trust deeds, are not affected or disturbed by the subsequent improvements or betterments made pursuant to such contracts.

Mechanic's Lien. Error to the Superior Court of Cook county;

Kircher v. Keating & Sons Co., 145 App. 1.

the Hon. JESSE HOLDOM, Judge presiding. Heard in the Branch Appellate Court at the March term, 1908. Reversed and remanded. Opinion filed December 4, 1908. Petition for rehearing dismissed for want of notice.

CARL R. CHINDBLOM, for plaintiff in error.

DUNN & HAYES and CHARLES H. PEASE, for defendants in error.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

This proceeding brings before us the record and decree in the foreclosure of two mechanics' liens in the Superior Court of Cook county, aggregating \$1,330.47 with interest, costs and attorneys' fees.

It appears from the record that George R. Gott owned the four pieces of property involved on October 15 and 25, 1901, when the contracts were made with the Central Lumber Company and M. Keating & Sons Company, defendants in error, to furnish the lumber and mill-work necessary to complete the buildings, and to furnish eight consoles for the same. The lumber and mill-work furnished amounted to \$1,259.28. On this amount \$228.81 was paid, leaving a balance due on this claim of \$1,030.47 for which a lien is claimed. The contract price with M. Keating & Sons Company for the consoles put in was \$300, for which a lien is also claimed.

When these contracts were made by the owner with the lienors, the four properties in question were subject to twelve trust deeds or mortgages, three on each lot and building thereon, given to secure a part of the purchase money of the land, and money borrowed by the owner as a building loan to construct the buildings. Eight of these trust deeds, two upon each property, conveyed respectively the properties to defendant in error, Edward G. Pauling, as trustee, to secure the payment of the building loan, and four of the twelve trust deeds, one upon each property, conveyed respect-

ively the properties to defendant in error, Axel Chytraus, as trustee, to secure part of the purchase money of the land. Plaintiff in error owns a note of \$3,500 secured by one of the trust deeds to Edward G. Pauling.

The proceedings were commenced by the filing of a petition by M. Keating & Sons Company, a corporation, on February 6, 1902, to establish and foreclose a mechanic's lien upon these four adjacent properties for \$300, or \$75 on each of the premises, and George R. Gott and Ada B. Gott, his wife, Edward G. Pauling, trustee, Axel Chytraus, trustee, and the "unknown owners" of the notes secured by the several trust deeds were made parties defendant. Gott and his wife and Pauling and Chytraus were personally served and answered. Substituted or constructive service only, based on an affidavit, was made on the "unknown owners", none of whom appeared. The Central Lumber Company was not then a party defendant. It was given leave later, on April 15, 1902, to file its answer *instanter*, and it filed an answer setting up its claim for a mechanic's lien for the amount above mentioned with interest, and praying that its lien be established. The "unknown owners" were all defaulted on May 9, 1902, on publication made from February 11, 1902, to March 4, 1902.

Upon a reference the master in chancery reported the testimony taken before him and the exhibits, and his findings; and on February 18, 1903, the court entered a decree finding that on and prior to October 25, 1901, George R. Gott was the owner of the premises, and that on that date he made a contract with the petitioner, M. Keating & Sons Company, to furnish and set in place eight consoles, two in each building, and that this work was completed on November 25, 1901, and petitioner was entitled to a lien for a total of \$300 with interest thereon from December 21, 1901, and for ten per cent. on that amount for solicitors' fees for the enforcement of said lien.

The decree also finds that on or about October 15, 1901, the Central Lumber Company contracted with Gott to furnish lumber and mill-work necessary to complete the buildings, and that the Lumber Company completed its contract on November 20, 1901, and that on February 20, 1902, there was due it a balance of \$1,030.47 for which, with interest and like solicitors' fees, it was entitled to a lien.

The decree also finds that the trust deeds to Pauling as trustee, were executed and delivered on May 14, 1901, each securing the payment of a note for \$3,500 bearing interest at six per cent.; and also, that on the same date four other trust deeds to Pauling were executed and delivered, each securing a note of \$250 with interest at the same rate; that all these trust deeds were duly filed for record respectively on June 14 and June 17, 1901; that the four trust deeds to Chytraus were executed and delivered on April 17, 1901, one on each of said properties, and each securing the payment of one note of said Gott for \$500 with like interest; that the court is unable to determine, because there is no competent evidence, whether said papers represent any present indebtedness or not, but the decree finds that the liens of the trust deeds, if they are liens, are prior and superior to the said mechanics' liens to the extent of the value of the land at the time of the making of the respective contracts of said lienors; and that the liens of said lienors are prior and superior to the liens of the trust deeds upon the buildings erected upon the land.

These proceedings in error are irregular and without precedent. The plaintiff in error sued out this writ of error, in his own name alone, against his co-defendants below, and the original petitioner. No objection, however, is made to the prosecution of the writ on the ground of such irregularity, and all defendants in error have waived the irregularity by joining in error. The motion of defendant in error M. Keating & Sons Company to dismiss the writ of error, and

reserved to the hearing, is based on other and wholly insufficient grounds, and must be denied.

Plaintiff in error was made a party to the cause, not by name, but as an unknown owner. He may prosecute this writ of error in his own name. Unknown Heirs, etc., v. Rouse, 3 Gilm. 408. He questions by his assignment of errors the jurisdiction of the Superior Court to hear and determine the cause on the ground that the affidavit filed as the foundation of the notice given to "unknown owners" was insufficient. Cross errors are also assigned raising the same question.

Section 12 of chapter 22 of the Revised Statutes provides that upon the filing of an affidavit by any complainant or his attorney, showing that any defendant, * * * "on due inquiry cannot be found", * * * "and stating the place of residence of such defendant if known, or that upon diligent inquiry his place of residence cannot be ascertained". Section 7 of the same chapter provides for making unknown owners, who are interested in the lands title to which is sought to be obtained in suits in chancery, parties to said suits or proceedings by the name and description of unknown owners, etc., and for notice by publication as required in the Act.

The affidavit filed in this cause in the attempt to comply with the provisions of the above sections of the statute, after other statements not material in this connection, says: "Affiant further says that on due inquiry the name or names of said persons cannot be found and on due inquiry the place or places of residence of said persons cannot be ascertained."

This affidavit, in our opinion, does not comply with the provisions of the statute. Instead of saying that the defendants cannot be found, the affidavit states that the name or names of said persons cannot be found. Instead of saying that the place of residence of the defendants is not known, and that upon "diligent inquiry" as required by the statute, "their places

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of residence cannot be ascertained ", the affidavit states that on "due inquiry" the place or places of residence of said persons cannot be ascertained. Where a court is exercising an extraordinary power under a special statute prescribing its course of proceeding, that course must be observed and followed exactly, in order to show that its proceedings are *coram judice*. Haywood v. Collins, 60 Ill. 328; Galpin v. Page, 18 Wall. 350. The facts which give jurisdiction over the person of the defendant ought to appear of record, and if they do not appear the decree may be questioned in both direct and collateral proceedings. Clark v. Thompson, 47 Ill. 26; Schnell v. City of Chicago, 38 *id.* 383; Morris v. Hogle, 37 *id.* 150.

It appears from the record that the four trust deeds executed to Axel Chytraus, trustee, each secured two notes for \$500 each, making \$1,000. There is no controversy or dispute as to this fact in the record. The decree finds that each of said trust deeds was given to secure one note for the sum of \$500. This is a substantive and material error.

At the time the contracts of October 15 and 25, 1901, were made with the lienors, respectively, the several buildings upon which the decree establishes a lien had been nearly completed. The liens of the lienors under the provisions of Section 1 of the Act to revise the law in relation to mechanics' liens approved June 26, 1895, which governs this proceeding, attached as of the date of the contracts respectively; and the lien extends only to the estate or interest the owner may have in the lot or land at the time of making the contract, or may acquire subsequently. By Section 16 of that Act, it is provided: "Where, after a trust deed or mortgage has been recorded, contracts shall be made for the improvement of the property, and the owner shall pay for labor or material in such improvement, the enhanced value thereby given shall be treated as a fund in which the mortgage and lien-holder shall participate *pro rata*."

The trust deeds to Pauling and Chytraus, trustees, were executed and recorded in April, May and June, 1901, long before the lien claimants made their contracts in October, 1901. The status of the property, therefore, with respect to the encumbrances existing on the days when the lien claimants made their contracts is not to be affected or disturbed, under the provisions of the statute, by the subsequent improvements or betterments. This accords also with the principles of equity, for, the lien should not be given such a retroactive effect or force that it would diminish the security of the mortgagees as it existed at the date of the contract. The mortgagees having put their money into the buildings, whereby the buildings had been brought to the point of completion where they were at the dates of the lien claimants' contracts, are not, by the statute, and should not in equity be disturbed or affected as to their security by the making of new contracts for additional work or materials.

This order of priority, as decreed, is obviously, we think, contrary to the provisions of the mechanics' lien law and is inequitable.

For the errors indicated the decree is reversed and the cause is remanded for further proceedings in accordance with the views here expressed, the costs of this court to be taxed against the lienors.

Reversed and remanded.

Mr. Justice CHYTRAUS took no part in the consideration of this case.

Hinrichs v. Consolidated Adjustment Co., 145 App. 8.

Gerhard H. Hinrichs, Executor, Appellee, v. Consolidated Adjustment Company, Appellant.

Gen. No. 13,945.

CONTRACTS—*when consideration does not fail.* The consideration for a contract does not fail so that it may be recovered back if the contract in question is in force and may ultimately be fulfilled by the party from whom such consideration is sought to be recovered.

Assumpsit. Appeal from the Circuit Court of Cook county; the Hon. GEORGE A. CARPENTER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed with finding of facts. Opinion filed December 4, 1908.

DEHAVAN B. COLE, for appellant.

ROSENTHAL, KURZ & HIRSCHL, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

February 23, 1907, a judgment in assumpsit was recovered in the Circuit Court by appellee Alice L. Hinrichs against appellant for \$187.97. The action was brought on the following contract:

"Series AA. No. 17400.

CONSOLIDATED ADJUSTMENT Co.
(Incorporated.)

Commission Rates:

On adjustments of over \$100.00, 10 per cent.	
On adjustments of over \$25.00 to \$100, in- clusive, 15 per cent.	Adjusters of claims of Every Description Everywhere.
On adjustments of \$25.00 or less, 25 per cent.	

LAW LOANS AND ADJUSTMENTS,
79 Dearborn St., Chicago.

This certifies that G. H. Hendricks, Agt. of Los Angeles, California, paid the Consolidated Adjustment

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Co. \$187.97 for a three year servitude from this date, with all benefits and privileges of its business system in its various departments, and The Consolidated Adjustment Co. agrees to promptly and faithfully prosecute any and all claims listed with it for adjustment under terms of this contract.

GUARANTEE.

This company agrees to recover in cash or secured net settlements from the claims of the above client at least \$497.92 within and under the terms of the above contract; or to refund the full initial fee paid, reserving the right to cancel the contract, refund the initial fee and surrender the claims of the above client, at any time after six months from this date; or to continue such service beyond the term first in this instrument mentioned, and until said last mentioned sum shall have been so recovered, without additional cost to the above client, except commissions on adjustments effected, on said claims or any additional claims in favor of said client, which may be forwarded.

Received of G. H. Hendricks (\$187.97) One Hundred Eighty-seven 97/100 Dollars as payment in full on a three year \$497.92 contract and guarantee from Aug. 8, 1903, to Aug 8, 1906.

Dated August 1, 1903.

Consolidated Adjustment Co.

By J. A. PATTEN,
Agent.

NOTE. This contract to be valid must have a coupon attached at time of issue which must correspond in every particular with terms of contract and guarantee to be signed by client and mailed direct to Chicago Office.

(The printed terms and conditions of this contract are not subject to any change or modification whatever.)

This company agrees to at all times confine its process within the limits of the law.

This contract to be issued for a period of not less than three years."

The record shows that some time after the contract was executed, appellant received for collection a mem-

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orandum of a note against Frank M. Bradshaw for \$9,000. Bradshaw was a brother-in-law of appellee and had borrowed from her that amount of money and had given his note therefor. The original note was retained by appellee and was never given to appellant.

After some effort appellant located Bradshaw in New York, and placed the claim in the hands of its attorneys there for collection. They reported that Bradshaw was of doubtful financial standing, and they had been unable to learn anything definite concerning his business. They advised placing the claim in judgment and asked a remittance of \$25 to cover costs. They also advised that it would be necessary to procure a bond in the sum of \$250 as security for costs. Appellee was notified of these facts, and that inasmuch as the claim would soon outlaw, it would be advisable to put the same in judgment, and appellant requested appellee to forward costs and send the original note to appellant and arrange for cost bond.

Appellee replied to appellant's letter that she did not care to place the note in judgment, and refused to forward the original note to appellant. She requested appellant to cancel the contract upon payment for services rendered. Appellant refused to cancel the contract and insisted upon reducing the claim to judgment.

On June 10, 1905, appellant again wrote to appellee, urging her to forward the note and provide for placing the claim in judgment, and that if appellee would assist in that regard it expected ultimately to recover at least the amount of the guaranty, mentioned in the contract. Before anything further could be done Bradshaw left New York and went to Mexico, where appellant succeeded in locating him. A letter from Bradshaw to appellant states that he was located at the city of Juanajuato, and that he expected to realize large profits from a mining deal in which he was interested. No other claims were filed with appellant; and appellant being unable to make any progress in

collecting the note during the three year period notified appellee of its election to continue the service under the contract beyond the three year period. Appellant has continued its service since the expiration of three years, and was actively engaged in the prosecution of the claim when this suit was brought to recover the initial fee of \$187.97 paid by appellee to appellant.

Upon a consideration of the evidence in the record we are of opinion that it fails to show a breach of the agreement on the part of appellant, and therefore fails to show a right of recovery by appellee. The evidence shows that the appellant exercised the option "to continue such service beyond the term first in this instrument mentioned, and until said last mentioned sum (497.92) shall have been recovered, without additional cost to the above client, except commissions on adjustments effected", etc. The contract is therefore in full force and appellee is not entitled to recover the initial fee paid by her to appellant.

The judgment of the Circuit Court is reversed with a finding of facts.

Reversed with finding of facts.

Richard Yeates, Appellee, v. Illinois Central Railroad Company, Appellant.

Gen. No. 14,184.

1. **CUSTOMS**—*how proof of may be made.* The usual manner of conducting a business at the place of an accident established by rule or rules duly promulgated by persons in authority or growing out of the practice of employes long-continued, is competent to be shown as shedding light on the acts and conduct of the parties and has a bearing on the question of negligence.

2. **NEGLECT**—*when conduct of switch-tender question for jury.* Held, that in view of the specific circumstances of the case shown by the evidence, including a severe snow storm which was prevailing at the time of the accident in question, and the consequent

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condition of the atmosphere, making it impossible to see but a very short distance, it was a question for the jury to determine whether the defendant's switch-tender was guilty of negligence or not in throwing switches and signalling the switch crew, of which plaintiff was a member, to proceed in a particular direction upon a particular track.

3. NEGLIGENCE—*when switch-tender guilty of.* Held, under the evidence in this case, that the jury were justified in finding that it was negligence on the part of a switch-tender not to halt a train but to send it forward ahead of the usual time.

4. NEGLIGENCE—*when proximate cause of injury.* Negligence is the proximate cause of an injury if it appears that but for such negligence the injury would not have happened even though not the nearest cause in the order of time.

5. MASTER AND SERVANT—*who not fellow-servants.* A switchman under the orders of a conductor is not a fellow-servant of such conductor.

6. TORTS—*what does not discharge joint tort-feasor.* A covenant not to sue one of two joint tort-feasors is not a bar to a suit against the other.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed December 4, 1908.

Statement by the Court. This is an appeal from a judgment of the Circuit Court for \$22,500 in favor of Richard Yeates, appellee, and against the Illinois Central Railroad Company, appellant, for damages for personal injuries alleged to have been caused by the negligence of appellant on December 12, 1903.

The plaintiff, appellee, filed an original declaration consisting of three counts, and later an amended declaration consisting of seven counts. On the trial, the jury were instructed to disregard the third, fifth, sixth and seventh counts of the amended declaration and the case was submitted on the first, second and fourth counts thereof, to which the general issue was pleaded. The negligence alleged in these counts is in substance that on the date above mentioned, Moore, a switch-tender of appellant, threw a switch and signalled and permitted the train in charge of a switching crew of

the Michigan Central Railroad Company, of which crew appellee was a member, to run northward along a track leading from tracks used in common by the appellant and the Michigan Central Railroad Company into the yards of the latter company on the lake front in the city of Chicago, at a time when he, Moore, knew that a road engine was liable and likely to be backing southward upon the same track, and that he negligently failed and omitted to notify those in charge of the in-going train that the road engine was liable and likely to be running south upon said track. No question is made on the pleadings, and it is not deemed necessary to set out specifically the averments of these counts of the declaration.

The evidence in the record shows without any substantial controversy the following facts: The Michigan Central Railroad tracks running into Chicago end at Kensington, and from that point its trains run into the city over the Illinois Central tracks to Harrison street, where they are switched onto tracks known as Nos. 5 and 6. No. 5 track is commonly used for trains going north into the Michigan Central yards, which extend from South Water street south to about Adams street. Between that point and Harrison street the two tracks, Nos. 5 and 6, are held by that company under a lease in perpetuity. Track No. 6 is commonly used for trains going south out of the yards.

At Harrison street is a diamond switch, which at the date of the accident was operated by a switch-tender in the employ of appellant, who threw the switches for all trains passing that point. The switch-tender was paid by appellant, but appellant was reimbursed by the Michigan Central company to the extent of one third of his wages.

While tracks 5 and 6 were commonly used as stated above, whenever track No. 5 was occupied or blocked, track 6 was also used for trains going north; and in addition to being used as a lead track, it was also used as a switching track nearly as far south as Harrison street.

When trains were delivered on track 5, it was the practice after the train had pulled in, to detach the road engine from the train, take the engine across to track 6 and proceed south with it on that track as soon as possible, out through the Harrison street switch to the engine house. Then a switch engine would come south over track 6 and back in behind the train on track 5 and push it up into the yards. Sometimes the switch engine would go south before the road engine. When delivery was made on track 5, the train was pushed on north into the yards; and when a train went north on track 6 it was the practice to go cautiously and under full control as engines might be expected at any time going south on that track.

The morning of December 12, 1903, was foggy and stormy, the worst snow storm of the year, according to the weather bureau, being in progress. About 8:30 o'clock that morning a Michigan Central freight train from Michigan City, Indiana, arrived over the track of appellant and stopped a little south of the Harrison street switch, waiting for a signal from Moore, the switch-tender. In a few minutes the switch-tender signalled it to come ahead, and it then ran north over the switch into and along track 5, until the rear end of the train was far enough in to clear track 6. The engine was then uncoupled from the train, and passed north and over to and upon track 6. It then started south on track 6.

Just after the freight train passed in on track 5 the transfer or switch train, upon which appellee was the forward switchman, came north and stopped a little south of the Harrison street switch and waited for a signal from the switch-tender, Moore. No one of the crew in charge of the transfer or switch train knew that a road train had just pulled in on track 5. After waiting a few minutes, the switch-tender lined up the switches and signalled the switch train to proceed. Upon receiving the signal the switch train with its engine at the north end of the train proceeded north over

the switch. All of the members of the crew testified that they did not know they were to be let in on track 6, until they reached the switch which turned them in upon that track. Some of the crew then observed the freight train standing on track 5, but none of them knew that the road engine, which had pulled the freight train in, had not come out on track 6.

At this point there is a conflict in the evidence. The switch-tender, Moore, testified that as the engine of the switch train was passing him he shouted to them, "Go up No. 6. I am letting you up the wrong main; go up easy." This is denied by all the members of the switch crew.

The switch train proceeded north very slowly and under full control, as the members of the crew testified that they were expecting to meet an engine coming south on track 6 at any moment. The bell on the switch engine was ringing. When the switch engine reached the Jackson street viaduct it collided with the road engine coming south, and appellee was crushed between the engine and tender, and so injured that it was necessary to amputate both his legs above the knees. The road engine was running south at a rate of speed from six to twelve miles an hour at the time of the accident; and at the Jackson street viaduct, steam from an Illinois Central engine standing to the east was blowing across the track. This, in connection with the snow storm, made it impossible for the crews of the engines to see more than a car length ahead. There is some controversy in the evidence as to whether or not there was a practice or custom in 1902 and 1903 regarding the letting in of trains on track 6 and holding trains at the Harrison street switch when track 5 was blocked, or until the road engine of the preceding train had come out.

The Michigan Central Company was made a party defendant to this action originally, but later appellee settled with that company and gave to it a covenant not to sue, and this action was dismissed as to it.

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At the completion of the evidence of appellee, and again upon the completion of all the evidence, appellant moved the court for a peremptory instruction and tendered a written instruction with such motion. Both motions were denied and the instructions were refused.

CALHOUN, LYFORD & SHEEAN, for appellant; JOHN G. DRENNAN, of counsel.

JAMES C. McSHANE, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The theory of the first count of the amended declaration is that the switch-tender wrongfully and negligently threw the switches and signalled the crew in charge of the switch engine and train to run north on track 6 while the road engine was backing south on that track and before it had passed out of it. This count does not base the right to a recovery upon any failure on the part of the switch-tender to warn the switch crew that the road engine had not passed out. The second and fourth counts of the amended declaration base the right to a recovery on the same negligence alleged in the first count, and in addition thereto these counts aver that the switch-tender negligently failed to notify the switch crew that the road engine had not passed out and was then backing south on track 6, or was likely to be backing south on that track.

Appellant contends that the trial court erred in refusing to sustain its motion for a peremptory instruction made at the close of appellee's evidence and renewed at the close of all the evidence.

In support of this contention appellant insists that the evidence does not tend to show negligence on the part of the switch-tender, or, if there was negligence on his part, that such negligence was the proximate cause of the accident by which appellee was injured.

The testimony of the members of the switch crew,

Fogarty the foreman, Mick the engineer, Collins a switchman, and appellee, shows that they all knew and appreciated the danger they were in when they went upon track 6; that when they saw there were cars standing on track 5 they knew that an engine might at any time come south on track 6; that "just as soon as the yardmaster could get to it there would be an engine come south on No. 6 to push these cars off of No. 5"; and for that reason they proceeded very slowly and cautiously, ringing their bell, and before going under the Jackson street viaduct, where the steam and smoke were the densest, the engineer brought his engine under perfect control and had practically come to a stop.

This evidence offered by appellee to show that the switch engine crew was not guilty of negligence in the operation of its train is cited by appellant as showing that appellee and his fellow-servants knew, when they were running on track 6, that there was a probability they would meet an engine running south on the same track, and knowing this fact, they were not relying upon any supposed assurance of the switch-tender that no engine would be on that track. On the contrary, they proceeded north on that track, expecting to meet another engine and to be able to stop in time to avoid a collision, their action indicating that they fully understood the situation and were conscious of the danger they were running, as fully as if they had heard Moore say to them what he testifies he said: "Go up No. 6. I am letting you up the wrong main, go up there easy."

This evidence, however, must be considered in connection with the fact shown by the evidence that the crew of the switch engine did not know that the road engine had not backed out and in all probability was running south on track 6 when the switch-tender signalled them to pass over the switch and ran them on to that track. The jury were justified by the evidence, we think, in finding that Moore knew, or should have

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known, that the road engine was backing south on track 6. He knew that the road train had passed over his switch and upon track 5, not more than five minutes before he allowed the switch train to pass north over his switch, and that the road engine was due to come out over track 6 at that time, which was about the usual time taken. He knew that the general custom was for road engines and engines of other roads making deliveries to come out as soon as possible. There is little or no contradiction in the evidence as to this uniform custom.

There is much contradictory evidence in the record, also, as to another custom and practice of long duration at this switch, for the switch-tender to hold out in-bound engines or trains until the road engines, which had delivered a train on track 5, had come out on track 6. This custom and practice was testified to by twelve witnesses, including the switch-tender Moore. The latter testified that he had attended to the Harrison street switches for three months at the time of the accident in question; and if track 5 was obstructed with a train and another train was following it in, he held them out until the road engine came out; and that until the morning in question he "never let a train in until after the road engine had come out".

In contradiction of this evidence, appellant introduced evidence of a number of witnesses to the effect that orders were never issued to this switch-tender, or anyone else, by any officer or employe of appellant having authority over him to hold trains out of these tracks, except in special instances, and that whenever given the order was special and not general, and was to apply only in that particular case. And it is contended that a switch-tender had no authority to establish such custom on his own initiative. But, we think, that if such a custom existed, as a matter of practice, though not by superior authority, the crew of the switch train would have a right to rely upon it, and to believe and assume that when they were admitted through the

switches at Harrison street and turned upon track 6, the road engine of the train standing on track 5 had passed out.

Considering the evidence of the custom or practice in view of the particular situation, and the reasonableness or unreasonableness of such a custom or practice under the situation and circumstances shown by the evidence, we think the jury were justified in finding that such custom and practice existed.

It is appellant's contention, however, that there is no competent evidence of the fact of this custom or practice because it is not shown that the rule was regularly promulgated by appellant or by anyone in authority authorized to make such rule or custom; and authorities are cited from other jurisdictions to support this position. We think, however, it is the settled law of this state that the usual manner of conducting the appellant's business at the place of the accident, whether it was established by a rule or rules duly promulgated by persons in authority, or it grew out of the practice of employes long continued, is competent to be shown as shedding light on the acts and conduct of the parties, and has a bearing on the question of negligence. *St. L., N. S. Y. v. Godfrey*, 198 Ill. 288; *C., B. I. & P. Ry. Co. v. Rathneau*, 225 *id.* 278, 284; *C. & A. R. Co. v. Harrington*, 192 *id.* 9; *N. C. St. R. R. v. Kaspers*, 186 *id.* 246; *C. C. Ry. Co. v. Lowitz*, 218 *id.* 24; and *Franey v. Union Stock Yards Co.*, 235 *id.* 522. As said in *Luebke v. C., M. & St. P. Ry. Co.*, 63 Wis. 92: "It was a sort of common law of the company, obligatory upon its employes, and as thoroughly understood by them as though it had been embodied in the printed regulations and read by the officers of the company to them. It thus became a rule or custom of the company, as well as an understanding between its employes".

It appears clearly from the testimony of Sheehan, the Michigan Central yardmaster, and other evidence in the case, that the effort and practice was to keep

track 5 clear and get the road engines out of the yard and off tracks 5 and 6 as quickly as possible; and that as soon as he knew or received word that a train was coming he generally had a switch engine waiting to start out on track 6 and push the train into the yard; and that sometimes the switch engine would follow the road engine out and sometimes the road engine would follow the switch engine, and in the great majority of cases both engines went right out at the same time. If, therefore, in-going trains or engines were held out according to the custom stated above, until the road engine had gone south over the switch at Harrison street there was usually and ordinarily no danger, for an engine or train going north on track 6 when track 5 was blocked, of meeting a south-bound road or transfer engine having the right of way and proceeding rapidly, and correspondingly there was little or no danger for the road engine or switch engine going south of meeting an engine on track 6, unless they were detained in the yard an unusual time; and in that event they knew, as a matter of course, that they did not have the exclusive right of way which the custom otherwise gave them, and that they might expect to meet an engine or train going north on track 6 if track 5 was blocked, and they would govern themselves accordingly.

In view of these considerations and the evidence of the special circumstances of the case, including the severe snow storm which was prevailing at the time, and the consequent condition of the atmosphere, making it impossible to see but a very short distance, it was a question for the jury to determine whether appellant's switch-tender was guilty of negligence or not in throwing the switches and signalling the switch crew, of which appellee was a member, to proceed north on track 6. The trial court did not err, therefore, in denying appellant's motions for a peremptory instruction to the jury.

In our opinion the evidence does not show that either appellee or the crew of which he was a member was

guilty of negligence. But if the conductor, or engineer or other member of the crew was guilty of negligence in not flagging the road engine, such negligence cannot be imputed to appellee. He was a switchman, under the orders of the conductor, and did nothing to influence or contribute to their negligence, if any. He was at his post of duty, as the evidence shows, and was crushed without fault or negligence on his part. C. U. T. Co. v. Leach, 215 Ill. 184; Nonn v. C. C. Ry. Co., 232 *id.* 378; C. & A. R. R. Co. v. Harrington, *supra*; C. & A. R. R. Co. v. Vipond, 212 *id.* 199.

The liability of appellant for the injuries sustained by appellee depends, therefore, upon the question whether appellant owed to appellee a duty, under the facts and circumstances shown by the evidence, and whether or not it was guilty of negligence with reference thereto, which caused the injury complained of. In our opinion it was the duty of appellant's switch-tender to hold the switch train and not send it north on track 6 until the usual time had elapsed for the road engine to deliver its train and back out on track 6 in the usual way, and that this duty was especially imperative under the extraordinary conditions existing on the morning in question. The switch-tender was guilty of negligence in failing to perform that duty.

The further question then remains on this branch of the case, was this negligence the proximate cause of appellee's injury.

We first notice appellant's contention on this question, that even admitting that the switch-tender was negligent at the time he let the switch train in and upon track 6, and that the effect of that negligence continued until after appellee knew they might meet an engine on that track, the switch-tender's act was not the proximate cause of the accident, because the evidence shows that the accident was caused by the negligence of the engineer on the road engine in going at a speed of 6 to 12 miles an hour without ringing his bell, when by reason of the blinding storm and

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steam he could see but a short distance ahead. In other words, the contention is that the negligence of the engineer of the road engine was an independent intervening cause which broke the causal connection between the switch-tender's negligent act and the collision.

As we have in effect said *supra*, even if the engineer of the road engine was guilty of negligence, and even though the conductor or engineer of the switch train was guilty of negligence, that fact would not relieve appellant from liability if the switch-tender's negligence was also a proximate or concurrent cause of the accident.

The negligence of the road engine could not have resulted in a collision had it not been for appellant's negligence in running the switch train north upon track 6. The switch tender was as much responsible, under the evidence, for the presence of the switch train at the point of collision as though he had run the train to that point with his own hands. If the act complained of so operates as to put the person in the way of the new force or independent act, it is a proximate cause. *Meyer v. Butterbrodt*, 43 Ill. App. 312, 316. Negligence is a proximate cause of the injury, if it appears that but for such negligence the injury would not have happened, even though not the nearest cause in the order of time. *Am. Ex. Co. v. Risley*, 179 Ill. 295, 299; *N. C. St. R. R. Co. v. Dudgeon*, 184 *id.* 477, 488. The cause that placed the servant in the position where he was injured by another cause is a proximate or concurrent cause of the injury. *Swift & Co. v. Rutkowski*, 82 Ill. App. 108, 113. And where two causes combine to produce an injury, and neither is sufficient in itself, both causes will be regarded as proximate or concurrent causes. *C. & A. R. R. Co. v. Wise*, 206 Ill. 453; *C. & A. R. R. Co. v. Averill*, 224 *id.* 516, 520. In 1st *Cooley on Torts* (3d Ed.), pages 226, 227, the rule is stated to be:

“When the contributory action of all accomplishes a

particular result, it is unimportant to the party injured that one contributed much to the injury, and another little, the one least guilty is liable for all, because he aided in accomplishing all”.

In our opinion, therefore, if it be assumed that the engineer of the road engine was negligent, that fact would not relieve appellant from liability for the collision, because, under the law and the evidence, the jury might find that the negligent act of the switch-tender remained the concurrent cause of appellee’s injury.

Upon a consideration of all the evidence bearing upon the question of liability of appellant for the injuries sustained by appellee, the verdict of the jury, in our judgment, should not be set aside as contrary to the weight and preponderance of the evidence.

The court, we think, did not err in refusing to set aside the verdict and in entering a judgment thereon, for the reason the verdict shows that the jury did not consider the covenant of appellee not to sue the Michigan Central Railroad Company, as running in favor of appellant as the agent and servant of that company in employing and paying Moore, the switch-tender. It is well settled that a covenant not to sue one of two joint tort-feasors is not a bar to a suit against the other. *City of Chicago v. Babcock*, 143 Ill. 358; *C. & A. Ry. Co. v. Averill*, *supra*; *W. C. Ry. Co. v. Piper*, 165 *id.* 325, 328. We do not think appellant was an employe of the Michigan Central Railway Company for the purpose indicated within the true meaning and legal effect of the covenant not to sue.

At the request of appellee the court gave the following instruction:

“4. The court instructs the jury, that even if you believe from the evidence that the engineer, or fireman, of the switch-engine, or the conductor of the switching crew in question, were guilty of negligence which contributed towards, or helped to cause, the collision in question, still if you further believe from the evidence

that the plaintiff did not in any way induce, cause or contribute to such negligence, if any, upon the part of the said engineer, fireman or conductor, then such negligence, if any, upon the part of said engineer, fireman or conductor, cannot be charged against, or imputed, to the plaintiff in this suit, provided the plaintiff was himself, before and at the time of the collision in question, exercising ordinary care for his own safety."

It is urged that the court erred in giving the instruction because it directs the jury to return a verdict for appellee, even though they found that the accident was proximately caused by the negligence of appellee's fellow-servants on the switch engine; and because, it in effect contradicted instruction No. 2 by which the jury were told that appellee could not recover in this case for any negligent act of any employe of the Michigan Central Railway Company.

We perceive no conflict in the instructions. We think it states a proposition of law well settled in this state by the authorities cited *supra*.

At appellee's request the court gave the following instruction:

"6. The court instructs the jury, that if you believe from the preponderance of the evidence that the switch-tender in question was the servant of the Illinois Central Railroad Company, and was not under the direction or control of the Michigan Central Railroad Company, and that plaintiff was the servant of the Michigan Central Railroad Company, and was not under the direction and control of the Illinois Central Railroad Company, then the plaintiff and said switch-tender were not fellow-servants, within the legal meaning of that term."

The criticism made upon this instruction is that it does not inform the jury as to the meaning of the term "fellow-servants", nor does any other instruction given in the case tell the jury the legal meaning of that term. And it is claimed there was evidence before the jury tending to show that the switch-tender was the servant of the Michigan Central Railroad Company,

and the jury were virtually told not to consider such evidence.

We are of opinion that there was no evidence tending to show that appellee was a fellow-servant with the switch-tender. We do not think that the jury were misled by the instruction; nor do we think the giving of the instruction was reversible error.

Finding no material error in the record, the judgment is affirmed.

Affirmed.

**James Kavanaugh, Appellee, v. Morgan & Wright,
Appellants.**

Gen. No. 14,189.

1. **MASTER AND SERVANT**—*basis of liability where servant injured while especially assigned to extra-hazardous work.* If a servant is taken from his regular work and ordered to perform more dangerous duties and is injured thereat he can only recover where his declaration alleges a failure to give him proper warning of the attendant danger, such danger not being obvious, or where the declaration shows that the servant was of immature years and was unable to comprehend the dangers of the duties to which he was assigned.

2. **PLEADING**—*when declaration will not support recovery.* A declaration which does not contain allegations supporting the negligence shown by the evidence will not support a recovery.

3. **PLEADING**—*what declaration charging negligence must show.* A declaration charging negligence and a consequent injury must show the causal connection between such negligence and injury.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed with finding of facts. Opinion filed December 4, 1908.

CALHOUN, LYFORD & SHEEAN, for appellant; ROBERT J. SLATER, of counsel.

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WALTER A. BRENDHECKE and PAUL C. SCHUSSMAN, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

This appeal is prosecuted to reverse a judgment of the Superior Court in favor of appellee and against appellant, Morgan & Wright, for \$2,488, on account of personal injuries sustained by appellee while in the employ of appellant, on or about June 21, 1905.

The original declaration consisting of two counts, was filed January 19, 1906. The first count thereof alleges: "Whereas, the defendant heretofore, to wit, on or about the 21st day of June, A. D. 1905, in the city of Chicago, in the county of Cook and State of Illinois, was then and there the owner, was possessed and had control of, and was using and operating a certain machine commonly called, to wit, a rubber mixer; that said machine then and there had a certain heavy iron pan used in connection with and as a part of said machine which was then and there situated and placed at and near a certain shafting so that the said pan was apt and likely to be pushed, shoved and thrown toward the front of said machine and against the person operating said machine, unless the said pan was properly fastened and secured so as to limit its motion and prevent from striking upon and against the person operating said machine; that the said pan of said machine was then and there not properly fastened and secured so as to limit and prevent the same from striking upon and against the person operating said machine; all of which facts the defendant then and there knew, or ought to have known; that the plaintiff was then and there in the employ of the defendant; that the defendant then and there carelessly and negligently commanded, ordered, directed and permitted and allowed the plaintiff to work in and about the operating of said machine while the same was so in an unsafe and dangerous condition; by means and in consequence

whereof said heavy iron pan then and there, while the plaintiff with the exercise of ordinary care was so engaged in and about said machine, struck upon and against the plaintiff, and then and thereby greatly injured him, both internally and externally, and he became therefrom forever crippled, lame and diseased."

The theory of this count is that appellant, knowing that the machine was so constructed that the shafting would throw the pan out against the person operating the machine, negligently ordered appellee to work at the machine and he was injured thereby. This count must be considered as basing the right to recover solely on the negligent order, or, as basing the right to recover upon negligence, in constructing the machine in the manner described, and the order to operate the same.

The second count of the original declaration, after averring ownership and operation of the machine by appellant, alleges that appellee "was then and there in the employ of the defendant as a common servant for hire, and as such was then and there pursuant to the commands, orders and directions of the defendant, engaged in and about the operating and running of said machine, that the defendant then and there so carelessly, negligently and improperly constructed, kept and maintained said machine and said revolving shafting that when said machine was in operation and said shafting was revolving, the said pan was apt to and would be pushed, hurled, thrown and would fall against and upon the plaintiff, while he was in the exercise of ordinary care, engaged in and about the operating of said machine, struck upon and against the plaintiff, and then and there greatly injured him both internally and externally, and he became therefrom forever crippled."

This count bases the right of appellee to recover upon the ground of negligent construction of the machine by which the pan was placed so near a revolving shaft that it would be thrown out against the operator

of the machine by the shaft, and that appellee was employed by appellant in and about operating the machine, and the pan struck against him.

Subsequently, on July 10, 1906, by leave of court appellee filed two additional counts. In the first of these counts the same negligent construction is alleged, and that the iron pan was "not properly fastened and secured so as to limit its motion and prevent it from being thrown against the person operating said machine"; and that appellant recklessly and wantonly ordered and directed appellee to work in and about operating said machine.

The second count of these additional counts alleges that appellant recklessly and wantonly constructed, kept and maintained the machine and revolving shaft so that as a direct result thereof, when the machine was in operation and the shafting was revolving, the said pan was pushed and hurled against appellee while he was engaged in operating the machine.

On June 11, 1907, two more additional counts were filed. In the first of these it is alleged that the regular and ordinary duties of appellee did not include the operation of the machine; that such operation by one not acquainted with its construction and inexperienced in operating it was accompanied with danger to the operator, and this fact was known or ought to have been known to appellant; that appellee was not acquainted with the construction of rubber mixers, and did not have sufficient experience to operate said mixer properly and with safety to himself; which fact appellant knew or ought to have known; that appellant negligently and carelessly did not instruct appellee in the proper and safe operation of said machine and warn him of the dangers of said machine, and as a result appellee was injured.

The second of said counts, after alleging the ownership of said machine and the employment of appellee, and that the regular and ordinary duties of appellee did not include the operation of a rubber mixer, avers

that it was necessary and proper to feed into such machine not more than a certain usual and proper amount of material; which facts were or ought to have been known to appellant; that appellant furnished and supplied appellee with a too large, unusual and improper amount of material, and as a proximate result appellee was injured.

At the close of the plaintiff's evidence, and again at the close of all the evidence, appellant moved the court to instruct the jury to find the defendant not guilty, and tendered written instructions to that effect. The court refused to grant the motion and marked the instruction "refused". Motions for a new trial and in arrest of judgment were overruled.

The undisputed evidence in the record shows that appellant was engaged in the manufacture of products composed of rubber and other compositions, and that in its business it made use of the machine in question, together with other similar machines, for the purpose of grinding and mixing certain compounds and rubber. This machine was known as No. 5. It consisted of two parallel, horizontal, hollow iron or steel rollers about five feet in length and eighteen inches in diameter, supported by an iron frame attached to each end of the rollers, and the rollers were operated by means of gears at the end of each roller, to which power was communicated through shafting, which revolved from the operator. The rollers revolved in opposite directions, towards each other at the top. They were adjustable so that the space between them could be increased or diminished by means of screws on the frame of the machine. The bottom of the rollers was about two and one-half feet from the floor. Sixteen or eighteen inches below the bottom of the rollers was a pan about six feet long and four feet wide, which extended beneath the rollers. This pan rested upon two iron rods, eight or ten inches from the floor, extending from side to side of the frame, one being under the side of the pan next to the operator and one on the

opposite side. The pan was made of sheet iron. The bottom was flat and smooth and not fastened or attached to the rods by cleats or otherwise than by its weight, which is not shown. Beneath it was the shafting, bolted together with a flange coupling which came within an inch or two of the bottom of the pan.

Appellee testified that on June 20, 1905, the day before the accident, Henderson, appellant's general foreman, came to him in the basement of appellant's factory where he was engaged in other work, and told him to go up-stairs and run mill No. 5; that appellee went to the mill and found five boxes of stock between mills 5 and 6; that there were four boxes of one kind, which was light in color, and one box of another which was heavy and dark; that the lighter colored material was composed of about equal parts of compound and chunks of rubber and weighed about 70 or 72 pounds, and the heavier batch was composed of about 100 or 105 pounds of compound and 20 pounds of rubber.

Appellee says he began work on the four lighter batches, and continued working with them until about 11 o'clock the next morning. In doing the work the first operation was to put the chunks or rolls of raw gum or rubber from one of the boxes through the rollers, and permit it to be passed down between the rollers and flattened out. This caused it to fall down into the pan in the form of a sheet and piled it up. It was then placed on the rollers and again passed through them. This operation was repeated until the desired thickness of about one-half inch was obtained, and the rubber had become warm and soft, and adhered to the rollers, entirely covering the same. The compound was then spread on top of the rollers and soft rubber with a small shovel and ground or mixed into the rubber.

All of the five batches were worked by appellee in the same manner. The accident happened while appellee was working on the fifth or heavier batch. He had ground the rubber of this batch through the rollers and

warmed it, and while working the compound in, the composition began to loosen or drop away from the rollers and swing down towards the pan in large circles. The more compound he put in, the farther it swung down, until, when he had all the compound worked in, the part swinging down towards the pan became so long that it doubled and piled up on the bottom of the pan, forming a bunch or pile in the pan under the rollers. Appellee permitted this piling up to continue for five or six minutes, during which time the folds of material in the pan increased until when there were five or six folds in the pan one on top of the other, the material in the pan became so heavy that it stuck to the pan, and the rollers continuing to revolve dragged the pan out from under the rollers and against appellee's leg, breaking it.

This is in effect appellee's description of the cause and manner of the accident. There is no evidence in the record tending to show that the accident was caused in any other way, or by any other means. If the bottom of the pan had come in contact with the shafting underneath it, as averred in the declaration, the pan would have been thrown away from appellee, for the shafting was revolving from appellee, and the top of the shafting coming in contact with the bottom of the pan would have carried it in the direction in which it was moving. We are forced to the conclusion, therefore, that the negligent construction of the machine alleged in the declaration is not shown by the evidence, and that it did not cause the injury complained of.

It is somewhat difficult to determine whether the *gravamen* of the first count of the original declaration is the defective and negligent construction of the machine, or the giving of a negligent order to appellee by appellant, with the unsafe and dangerous condition of the machine as a matter of inducement. If it was the negligent construction complained of, the evidence, as we have seen, does not tend to support

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it. If the gist of this count is the negligent order to appellee by appellant, then, the evidence tends to show simply and only that he was ordered to leave one service and engage in another and more dangerous work. Under such an order the liability, if any, must be predicated upon a failure to give proper warning of the attendant danger, in cases where the danger is not obvious, or where the servant is of immature years or unable to comprehend the danger, and the count does not make the necessary averments. *Reed v. Stockmeyer*, 74 Fed. 186; *Paule v. Florence M. Co.*, 80 Wis. 350; *Cole v. Chicago & N. W. R. R. Co.*, 71 Wis. 114. Nor does the evidence show a cause of action, if the averments of this count were sufficient. Appellee was a man of fifty-seven years of age at the time of the accident. He consented to do the work ordered without objection on account of his want of knowledge, skill or experience in doing such work. He had worked on this and similiar machines before. No negligence of appellant can be predicated upon such a state of facts as shown by the evidence. *Cole v. Chicago & N. W. R. R. Co.*, *supra*.

The averment of this count that the pan was not properly fastened and secured must be held to apply to the danger arising from placing the pan "at and near a certain shafting so that said pan was apt and likely to be pushed against the person operating the machine." The only claim of negligence which this count avers and appraises appellant of, was the failure to provide against the danger arising from the shafting acting upon the pan. It appears clearly from the evidence, and without controversy, that the accident happened because the material which appellee was grinding or passing through the mill dragged the pan out against him. The evidence, therefore, if it be conceded it shows a cause of action, wholly fails to support the averments of the count.

It is familiar law requiring no citation of authorities that "one object of a declaration is to state

the facts relied upon for recovery so plain that the defendant may be prepared to meet them. This object in pleading would be entirely defeated if a plaintiff had the right to aver in his declaration one ground of action, and on the trial prove another and different ground." *T. W. & W. Ry. Co. v. Foss*, 88 Ill. 551. "The rule is fundamental that a plaintiff must recover, if at all, upon the case made by his declaration, and in the application of this rule to actions for negligence, plaintiff cannot allege a specific act of negligence, and recover upon proof of negligence of a different character. *North Chicago Street Railroad Company v. Cotton*, 140 Ill. 486; *Chicago, Burlington & Quincy Railroad Company v. Bell*, 112 *id.* 360." *C. & E. I. R. R. Co. v. Driscoll*, 176 Ill. 330, 336; *International Packing Co. v. Cichowicz*, 107 Ill. App. 234.

The second count of the original declaration attempts to state a cause of action for the negligent construction of the machine in substance as set forth in the first part of the first count, namely: the liability of the pan to be forced out by the action of the revolving shaft. It is incomplete, however, for the reason that it fails to state any causal connection between the negligence set forth and the injury to the plaintiff. But, such omission being supplied, the evidence, as we have seen, shows that the revolving shaft had no connection with the injury, and hence, no recovery can be sustained under this count upon the evidence.

There is no evidence in the record tending to show that the acts alleged in the two additional counts filed July 10, 1906, were "recklessly and wantonly" committed. In other respects the negligence averred in these counts is the same as in the original declaration, and what we have said in the discussion of the case made under these counts applies with equal force to these counts.

The first additional count filed June 11, 1907, al-

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leges that appellee was not acquainted with the construction of rubber mixers, and did not have sufficient experience to operate said mixer properly and with safety to himself, which fact appellant knew or ought to have known; that appellant negligently and carelessly did not instruct appellee in the safe and proper operation of said machine, and warn him of the dangers of the machine; and as a proximate result, appellee, while exercising ordinary care, was injured.

In order to support a recovery under this count it was necessary for appellee to prove that there was a danger incident to the construction and operation of the machine in question; that the danger was known to appellant but unknown to appellee; that appellee's lack of knowledge or appreciation of the danger was excusable, and that appellant knew or should have known that appellee was thus excusably ignorant of the hazard and was thereby exposed to a hazard or danger beyond those which he was presumed to contemplate as incident to the employment; that appellant failed to warn or instruct him with reference thereto; and that appellee was in the exercise of ordinary care.

No case can be found, we think, which holds that the mere fact that the employer requested or ordered his employe to perform a temporary work, outside of his ordinary employment, was a violation of any duty which he owed to his employe. Whether such an order be a violation of such duty depends always upon the surrounding circumstances. If the particular work ordered to be done is of a dangerous character, and requires peculiar skill in its performance, and the person directed to perform such work has not the requisite knowledge or skill for doing the work with safety, and such want of skill or knowledge is known, or might be reasonably supposed to be known, to the employer, the direction of the employer to do the work, without giving warning of the danger or instruction, might be held to be a violation of duty which he owes to

his employe, even though the employe undertakes to do the work without objection or protest on his part. *Cole v. Chicago & N. W. R. Co. supra*. But, in order that a master may be properly charged as being thus negligent, and made liable for resulting injury, it must be made to appear that he knew, or by the exercise of reasonable care and observation might have known, of the inexperience, disqualification and immature judgment of the servant.

The evidence in the record shows that appellee was at the time of the accident a man of mature years, large experience and intelligent; that he had for many years been a farmer and for sixteen of those years had conducted a farm for himself, and was necessarily acquainted with machinery, especially of a simple character, such as the machine in question; that for nine or ten years he had been in the employ of appellant, and during at least a large part of that time, had worked near or upon this and other similar machines, and three months upon this particular machine. He knew that pans on machines of the character of the particular machine in question were frequently thrown out, and while he testified that he did not know that he had ever seen it happen, he admitted that he had heard the operators talk about it, and said in his testimony: "Oh, God, I could not tell you how many times I have heard them talking about it". He testified he had seen pans move backward and forward on other machines four or five inches, and on some of the larger machines more than that, although he "had never seen them come out with any degree of force to be alarmed at."

The proof shows, in our opinion, that appellee had large experience with these machines before he was injured, and that this machine and the other similar machines on which he had worked were of the most simple construction, and that all of the parts of the machine in question were open and obvious to the most ordinary observation. Appellee's description of the

machine and its parts, including the dimensions and location of such parts, the method by which it was operated, and the manner of supporting the pan shows that he was familiar with the machine and its construction and operation. According to the testimony of Henderson, appellant's general foreman, appellee was a mill man, mixer and lengo maker. He would make lengo for three weeks at a time, or a month and a half or two months, and he was then sent back to number 5 mill, sometimes to another mill; that he worked on number 5 mill about one-half or two-thirds of the entire time, and the rest of the time he made lengo. He was considered the regular operator of number 5 mill. He never made any complaint of the pan coming out from the mill. To the same effect is the testimony of Redmond and Bagley, assistant foremen of the mill department.

From the testimony and the circumstances of the case as developed in the proof we are of the opinion that the preponderance of the evidence is decidedly against appellee's right to recover under this count of the declaration.

The second additional count filed on June 11, 1907, predicates liability upon appellee's inexperience; that for the safe operation of the machine it was necessary to feed into it not more than a certain amount of material, and that appellant "furnished and supplied plaintiff with a too large, unusual and improper amount of material", and the accident happened as a proximate result thereof.

The only evidence of the order given to appellee was that the foreman "told me to go up and run that mill No. 5." Appellee does not claim in his testimony that Henderson told him to run any particular batches of stock, or quantities of stock, or that he was told to run such stock as he might find there in the particular quantities in which he might find it at or near the mill. The evidence does not show how the particular batches which appellee mixed came to be at or near the mill.

Henderson did not know how much material there was in these particular batches. He testified that the largest batches he ran on mills of the type of No. 5 were about 100 pounds. By whom the compounds were actually mixed and whether by the authority and knowledge of appellant was for appellee to show, but it is not shown.

We have stated *supra* appellee's evidence as to the manner in which he fed the material into the mill and how it piled up in the pan for five or six minutes before the pan was shoved out. He knew during this time that the action of the rubber was liable to cause trouble and he testifies that at the time he grabbed his knife and was about to cut it off, when the pan was thrust out. His evidence shows, we think, that he had ample warning that he was putting too much material in the machine and yet he continued to feed the mixture into the machine after he knew it was likely to get up between the rollers and stop them and "break something." This evidence, we think, tends to prove contributory negligence on the part of appellee, and that no recovery under this count can be sustained.

It is our opinion, therefore, that the evidence fails to sustain any count in the declaration, and the judgment must be reversed for that reason.

These questions are raised, we think, by the motion for a peremptory instruction, the motion for a new trial and the motion in arrest of judgment, and appellee's contention that they are not properly raised cannot be regarded as well founded.

Holding these views upon the merits of the case, we do not find it necessary to consider the other errors assigned and argued.

The judgment of the Superior Court is therefore reversed with a finding of facts.

Reversed with finding of facts.

Hanrahan v. City of Chicago, 145 App. 38.

**John J. Hanrahan, Appellee, v. City of Chicago et al.,
Appellants.**

Gen. No. 14,193.

1. **NEGLIGENCE**—*what does not constitute actionable, against municipality.* The failure of a municipality to remove or cause to be removed from a public street a weak and dangerous awning attached to private property and extending over a part of such street but not resting upon or attached thereto, is a failure by such municipality to perform one of its duties which it is empowered to perform as a governing agency but the failure so to do does not render it liable for injuries resulting to an individual.

2. **EVIDENCE**—*competency of conviction of crime.* It is error for the court to refuse to permit cross-examination of the plaintiff as to his previous conviction of a crime against the election laws of the state and as to his confinement in the penitentiary; such evidence in an action for personal injuries is not only competent upon the question of credibility but upon that of damages, as if his confinement had been at hard labor the injuries for which he claimed in the action might have been at least in part induced by such hard labor.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed and remanded. Opinion filed December 4, 1908. Rehearing denied December 18, 1908.

Statement by the Court. This action was brought by appellee, Hanrahan, against City of Chicago, Frank Salter, F. Salter & Company, a corporation, and Dave Heyman.

The original declaration alleges that the defendant, City of Chicago, was on December 12, 1903, a municipal corporation and as such was then and there possessed and in control of a certain public sidewalk on the west side of Jackson Park avenue, a public highway in said city; and the defendants, F. Salter & Company, a corporation, Frank Salter and Dave Heyman, possessed a certain building abutting on said Jackson Park avenue, at the southwest corner of said Jackson Park avenue and Sixty-seventh street, a public high-

way also then in the control of the City; that long prior to and at the time aforesaid there was a large and heavy wooden awning extending out from said building and over and above said public sidewalk on the west side of said Jackson Park avenue at the height of ten feet above the sidewalk; that persons traveling on said sidewalk passed under said awning and were thereby exposed to great danger if said awning should fall. By reason of the premises it became and was the duty of the defendants to exercise ordinary and reasonable care toward keeping and maintaining said awning in a reasonably strong and safe condition so that it would not fall, but in disregard thereof, long prior to and at the time aforesaid they permitted and allowed said awning to become and remain in a weak, dilapidated and defective condition, which had existed for a sufficient length of time prior to the injury complained of to have enabled the defendants in the exercise of ordinary care to have discovered said condition; that while plaintiff was walking under said awning and in the exercise of ordinary care for his own safety, said awning, by reason of its said weak and dilapidated condition, fell upon the plaintiff and injured him.

Subsequently plaintiff filed an additional count, setting up the possession and control of the public street known as Stony Island avenue and a sidewalk upon and along the west side of said street, and that defendants F. Salter & Company, a corporation, and Frank Salter were the owners of and in possession of a certain building situated on the west side of said street immediately south of Sixty-seventh street, the front of which building extended out to said sidewalk, and there was an awning attached to and a part of said building which extended out from said building over and some distance above said sidewalk, and that pedestrians were accustomed to pass under said awning in walking along and upon said sidewalk; that long prior to December 12, 1903, and prior to and at the time of the

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leasing or letting of said building thereafter referred to said F. Salter & Company and Frank Salter wrongfully and negligently permitted said awning to be and remain in such defective and insecure condition that it was liable to fall upon pedestrians, and that "said condition of said awning amounted to a nuisance," all which facts said last named defendants knew or could have known by the use of ordinary care prior to and at the time of the leasing, and that while said awning was in said condition said last named defendants leased said building, including said awning, to the defendant Dave Heyman, who then and there took possession of said building, including said awning, and remained in possession of the same from thence to and including the time of the injury complained of; that said defective and dangerous condition of said awning was known to said Heyman and the City of Chicago, or could have been known by the exercise of ordinary care in that behalf, but each of said defendants wrongfully and negligently permitted said awning to remain in said defective condition long prior to and at the time of the injury complained of; and while plaintiff was walking along and upon said sidewalk and under said awning with ordinary care for his own safety, said awning, as a direct result and in consequence of said defective condition, fell upon plaintiff and injured him.

To this declaration the defendants interposed pleas of general issue and Frank Salter and Salter & Company filed special pleas denying ownership.

On the trial plaintiff discontinued the suit as to Frank Salter and Dave Heyman and amended his declaration on its face by striking out the name of Frank Salter and inserting the name of A. G. Hieronimus. The jury returned a verdict for \$5,000 in favor of the plaintiff and against F. Salter & Company and City of Chicago. Plaintiff remitted \$1,500, and after denying a motion for a new trial and in arrest, judgment was entered for \$3,500 on the verdict.

The evidence introduced by the plaintiff tended to show the existence of the awning projecting over one-half way across the sidewalk at the southwest corner of Jackson Park avenue, otherwise known as Stony Island avenue, and Sixty-seventh street along the full length of the building, and attached thereto but not touching the surface of the street; that the awning was rotten and decayed prior to August 20, 1903, and that on December 12, 1903, a snow storm with a strong northeast wind prevailed and plaintiff while walking south on the sidewalk under the awning was struck and knocked down upon the sidewalk by the awning as it fell from the building.

EDWARD J. BRUNDAGE, JOHN R. CAVERLY and ARNOTT STUBBLEFIELD, for appellants; EDWARD C. FITCH and RICHARD W. DONOVAN, of counsel.

JOHN C. KING and JAMES D. POWER, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The record in this case presents the question whether the declaration sets out substantially a cause of action against the City of Chicago.

Upon an examination of the declaration it will be perceived that the *gravamen* of the charge against the city is its failure to discharge its duty to exercise reasonable care in keeping the sidewalk in question in reasonably safe condition for ordinary travel, in that it did not cause the awning to be removed when it knew it was dangerous. In thus stating the case made by the declaration we take the substantive facts averred and ignore the particular averments of duty as to the city, for it is from the facts averred that the duty, if any, arises under the law. No permission is averred on the part of the city to erect and maintain the awning. The negligence averred is the failure to remove the unsafe awning. If we are correct in this

conclusion, it follows that the cause of action laid in the declaration amounts to this that the agents or police officers of the city were remiss in duty and therefore guilty of negligence in not removing from the public street the weak and dangerous awning attached to private property and extending out over a part of the public street. This presents the question whether such omission or negligence on the part of the police officers or agents of the city constitutes a ground of private action against the city in favor of one injured on account thereof. The solution of this question depends upon the nature of the power and duty invoked.

In *Oliver v. Worcester*, 102 Mass. 489, Justice Gray, speaking for the court, says: "The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, as the management of property and rights held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public".

This distinction is clearly stated by Mr. Justice Bailey, speaking for the court in *Culver v. City of Streator*, 130 Ill. 238. The cause of action declared on in that case was injury caused by the negligent and careless acts of the servants of the city while destroying dogs running at large contrary to a city ordinance. The court said, in discussing the declaration, at page 243: "Merely denominating him a servant or employe does not make him such in a sense calling for an application of the maxim *respondeat superior*. Whether he was a servant or employe in that sense depends mainly upon whether he was employed to perform acts which the corporation could do in its private or corporate character, or acts which the corporation was empowered to do in its public capacity as a governing

agency, and in discharge of duties imposed for the public or general welfare. Acts performed in the exercise of the police power plainly belong to the latter class”.

In the one case there is an implied or common law liability for the negligence of the officers in the discharge of such duties, and in the other no private action lies unless it is expressly given by statute. *Oliver v. Worcester*, *supra*; *Detroit v. Corey*, 9 Mich. 165; *Dillon on Municipal Cor.*, (4th Ed.) Vol. 2, Secs. 974 to 980, inclusive, and cases cited in notes; *Town of Odell v. Schroeder*, 58 Ill. 353; *Wilcox v. City of Chicago*, 107 Ill. 334, and cases determined in Massachusetts, New York, Connecticut, Iowa, Missouri and California there cited. In *Wilcox v. City of Chicago*, *supra*, the exemption from liability is placed on the ground that “the service is performed by the corporation in obedience to an act of the legislature, is one in which the corporation has no particular interest, and from which it derives no special benefit in its corporate capacity”, and upon the additional ground of public policy.

The ground of liability alleged in the declaration in this case,—the failure to remove from the public street the weak and dangerous awning attached to private property and extending out over a part of the public street, but not resting upon or attached to the street, relates in our opinion to the failure to perform acts which the city is empowered to do as a governing agency and in discharge of duties imposed for the public or general welfare, and the maxim *respondeat superior* does not apply to such acts, or to an omission or failure to perform them.

We are aware of the conflict of authorities upon this subject, some of which, namely: *Bohen v. City of Waseca*, 32 Minn. 176; *Bieling v. City of Brooklyn*, 120 N. Y. 98, are cited by appellee, but we are disposed to follow the general current of the decisions of our Supreme Court as we understand them, and in

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doing so we are compelled to hold that the declaration in this cause does not state a cause of action against the appellant, City of Chicago.

In our opinion, the trial court erred in refusing to permit appellee, a witness called in his own behalf, to answer the questions put to him on cross-examination in regard to his life and habits prior to the accident, and calculated to draw from him the fact of his conviction of a crime against the election laws of the State, and that he had been confined in the penitentiary. The facts called for by the questions also had a bearing on the question of damages. If on such testimony as he might give the jury might find that appellee had been confined in the penitentiary at hard labor, and from the character of the work which he did while there, and his physical environment, the action of his heart and his kidneys had been thereby affected, there would be a basis for finding that the injuries which he suffered from the falling of the awning were less than they appeared to be from his direct examination.

For the errors indicated the judgment of the Superior Court is reversed and the cause is remanded.

Reversed and remanded.

Eva Jurkiewicz, Appellee, v. Illinois Central Railroad Company, Appellant.

Gen. No. 14,196.

1. CONTRIBUTORY NEGLIGENCE—*when passenger not guilty of.* A passenger in seeking to alight from a railroad train has a right to assume that ample time will be afforded for such purpose; *held*, under the evidence in this case, that a passenger injured while alighting was in the exercise of ordinary care.

2. PASSENGER AND CARRIER—*duty of latter to permit former to alight.* *Held*, that the following instruction as to when a carrier is not liable for injuries to a passenger suffered while in the act

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of alighting, was properly refused, in that it left out of consideration the important element that the carrier owed to the passenger the utmost and highest degree of care, skill and diligence for her safety consistent with the mode of conveyance employed, and that the carrier's servants in charge of the train were required to know, if by the exercise of due care, caution and diligence they could know, that the passenger was attempting to alight from the train before they started it.

"The court instructs the jury that while railroad companies are required to announce stations approached or reached, and to give passengers a reasonable time in which to leave the train, they are not required to see that passengers do in fact depart from the train upon arriving at their destination. If, therefore, you believe from the evidence in this case that the defendant gave the plaintiff a reasonable time and opportunity to alight from the train in question; and if you further believe from the evidence that when the employes of defendant started said train they did not know that any passengers were alighting therefrom, in such case it is your duty to find the defendant not guilty."

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed December 4, 1908.

Statement by the Court. This appeal is prosecuted from a judgment of the Superior Court, entered in favor of appellee and against appellant for \$500.

The original declaration consisted of two counts. The first count averred the possession and operation of a certain railroad by appellant, on November 23, 1902, extending from Harvey, Illinois, northward to and beyond a station known as Kensington; that appellant received appellee as a passenger upon one of its trains under the control of its servants; that when the said train arrived at Kensington, appellant did not use reasonable care to give appellee reasonable time and opportunity to alight from the train in safety, but carelessly and negligently started the train violently in motion while appellee was in the act of alighting therefrom, and appellee, while using due care and caution, was thrown with great force and violence upon the station platform and was injured.

The second count makes the additional averments that the car on which appellee was riding was pro-

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vided with iron gates which it was the duty of appellant and its servants to use reasonable care to close before starting and moving the train, and that they failed and neglected to close the gates when the train started from Kensington.

Additional counts were subsequently filed which allege in substance the same facts set forth in the first original count.

The evidence tends to show that appellee was a woman about sixty-one years of age at the time of the accident, and that she resided at Harvey, Illinois. On Sunday, November 23, 1902, she left her home in Harvey to go to South Chicago to attend a meeting. To reach South Chicago she took appellant's train at Harvey to ride to Kensington, a station in the city of Chicago. She was accompanied by Mrs. Ruczynski, and at the station at Harvey they met two acquaintances, Joseph Zellebuski and his sister. Mrs. Krenicki also boarded the train with them, all entering and riding in the same car. It was a suburban train, consisting of five cars and the engine.

Before reaching the station at Kensington, the train stopped at a water tank situated about four or five hundred feet south of the station. The conductor left the train at the water tank and walked north to the through station on the east side of the tracks, registered his train and crossed over to the west side of the tracks and went up to the station platform. During this time the train had taken water, proceeded to the platform, discharged and taken on passengers.

This station platform is on a level with the car platforms and extends to within an inch or two of the cars. The car platforms are extended by what are termed aprons, covering the steps, thus enabling passengers to step off and onto the station platform without using the steps.

After the train stopped about fifteen or twenty passengers alighted, Zellebuski, Mrs. Krenicki, Mrs. Ruczynski and appellee being still on the train. It is

claimed by appellant that the train remained at the station a minute and a half or two minutes. As the conductor came upon the platform, the collector and the flagman gave him the signal "All right", and the conductor in time signaled the engineer to start. At this moment appellant claims there was no one on the platform seeking to get on or alight from the train. On the other hand the evidence tends to show that the three people above named with appellee appear to have been the last to leave the car in which they had been riding. Appellee was preceded by Zellebuski, his sister, Mrs. Krenicki and Mrs. Ruczynski in the order named. All the passengers who had preceded Zellebuski had alighted and Zellebuski also had stepped upon the platform of the station. Mrs. Krenicki had also stepped upon the station platform, or was in the act of doing so, when the conductor gave the signal to start, and the train started. Mrs. Ruczynski stepped to the platform directly after Mrs. Krenicki and was thrown upon the platform. After she had fallen, appellee, looking down and not observing that the train was moving, stepped upon the platform and was thrown down upon it. One of the train crew saw these people as they were moving towards the end of the car and gave the signal by means of the bell-rope to stop the train, which was done within a few feet.

CALHOUN, LYFORD & SHEEAN, for appellant; JOHN G. DRENNAN, of counsel.

W. D. MUNHALL, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

At the close of all the evidence the court refused to give a peremptory instruction in favor of appellant, and this is relied upon as error. It is contended that there was no evidence before the jury tending to show appellant guilty of negligence as alleged in the declaration.

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The evidence of Zellebuski, Mrs. Krenicki, Mrs. Ruczynski and of appellee tends to show that when the train stopped at the Kensington station quite a large number of people left the car in which appellee had been riding, and that Zellebuski, who was in the lead of the party with appellee, followed closely after people who were leaving the same car, and he was compelled to wait for them; that the rest of the party, including appellee, followed closely after him. After Zellebuski reached the station platform he saw the conductor give the signal to start the train and he looked back to see his sister who was following, and observed that she had alighted before the train started. As Mrs. Ruczynski was stepping off, the train started and threw her to the platform. Appellee was just behind her and was also thrown down. The evidence of these witnesses tended to prove the allegations of the declaration, in our opinion, and the court, therefore, did not err in refusing the peremptory instruction, unless the evidence shows conclusively that appellee was guilty of contributory negligence.

On the question of appellee's contributory negligence the testimony of all the witnesses above mentioned has a bearing, and might properly be considered by the jury. The testimony of appellee tends to show that without delay she started to leave the car when the train stopped, and that she followed closely the other passengers out of the car. She had a right to assume that ample time would be given for her to safely alight, although many people were leaving the car ahead of her. Her movements were necessarily controlled by those ahead of her, and hence her delay, if any there was, may have been caused wholly by other passengers. She testified that she did not see the car start or feel it start or feel anything to indicate that it was moving.

From a review of all the evidence we think it was a question for the jury, on the evidence in the case, to determine whether appellee, by her negligence, if any,

contributed to the injury sustained by her, and that therefore the court did not err in leaving that question to the jury.

In our opinion the verdict of the jury is not so manifestly against the weight of the evidence that we ought to set it aside on that ground.

It is urged that the trial court erred in refusing to give to the jury instructions numbered respectively 15, 16, 17, 18 and 19 requested by appellant.

An examination of the instructions given by the court shows, in our opinion, that the jury were fully instructed upon all the substantial issues in the case. It appears further that refused instructions 15, 16, 17 and 19 were substantially covered by other instructions given.

Refused instruction No. 18, requested by appellant, is as follows:

“18. The court instructs the jury that while railroad companies are required to announce stations approached or reached, and to give passengers a reasonable time in which to leave the train, they are not required to see that passengers do in fact depart from the train upon arriving at their destination. If, therefore, you believe from the evidence in this case that the defendant gave the plaintiff a reasonable time and opportunity to alight from the train in question; and if you further believe from the evidence that when the employes of defendant started said train they did not know that any passengers were alighting therefrom, in such case it is your duty to find the defendant not guilty.”

In our opinion this instruction does not correctly state the law applicable to the facts of this case. It would have told the jury, if given, that under no circumstances would appellant be guilty of negligence in starting its train while appellee was in the act of alighting therefrom, if the train had stopped a sufficient length of time to permit appellee to alight, unless the employes of appellant knew appellee was

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alighting. It leaves out of consideration the important element that appellant owed to appellee the utmost or highest degree of care, skill and diligence for her safety consistent with the mode of conveyance employed; and that appellant's servants in charge of the train were required to know, if by the exercise of due care, caution and diligence they could know, that appellee was attempting to alight from the train, before they started it. *North Chicago St. R. R. Co. v. Cook*, 145 Ill. 557. A carrier of passengers may not relieve itself from liability, in cases like this, by proving that its trainmen did not know passengers were alighting. The instruction was properly refused.

Finding no error in the record the judgment is affirmed.

Affirmed.

Richard L. Tuthill, Appellee, v. Belt Railway Company of Chicago, Appellant.

Gen. No. 14,186.

1. *APPEALS AND ERRORS—scope of appellant's right to urge errors in denying peremptory instruction.* The fact that an appellant in the trial court urged only one ground in support of a motion to direct a verdict does not affect his right upon appeal to urge other grounds as to why such motion should have been granted.

2. *EVIDENCE—when disregarded though not stricken out.* Evidence clearly incompetent and so treated upon the trial will be disregarded upon appeal though not formally stricken out.

3. *EVIDENCE—when circumstantial, will not support verdict.* Circumstantial evidence alone will not support a verdict where, assuming all to be proved which such evidence tends to prove, some other hypothesis may still be true, inasmuch as it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof.

4. *EVIDENCE—what not failure to produce.* A party is not bound to produce a witness who is no longer in its employ and its failure so to do does not entitle the jury to draw unfavorable inferences—the ability of such party so to produce not appearing.

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5. **NEGLIGENCE**—*what not competent to sustain.* Proof of previous acts of negligence or a bad reputation for the exercise of care is not admissible as tending to show that a particular employe was negligent at the time of the accident in question.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed and remanded. Opinion filed December 4, 1908.

Statement by the Court. In an action on the case for personal injuries plaintiff had judgment for \$15,000 and defendant appealed.

Plaintiff, when injured, was the conductor of a switching crew of defendant, consisting of himself, Beckler engineer, Pflaeger head brakeman, Kelner rear brakeman, and a fireman.

The declaration alleged that through the negligence of Pflaeger, plaintiff lost his arm, and that the defendant negligently, etc., employed and retained Pflaeger, a negligent, incompetent, unfit switchman.

At the close of plaintiff's case, defendant moved the court to direct a verdict of not guilty; the motion was denied and exception taken. Defendant offered no evidence, and on the coming in of the verdict for the plaintiff, moved for a new trial, on the grounds, among others, that the court improperly refused to direct a verdict for the defendant, and also that the verdict was contrary to the evidence; the motion was denied and defendant excepted.

The train of which plaintiff was conductor when injured had in it more than forty freight cars. It stopped at a station on defendant's road, and it became necessary to cut the train into two sections. Plaintiff told Pflaeger, in the presence of the engineer, that he was going back to cut the train. He went back and made the cut about the middle of the train, gave the signal, and the front section started forward. When the train moved, plaintiff discovered that something was wrong with the coupling between the rear car of the head section and the car next in front, and

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gave the signal to stop. Before the train stopped, the rear car became uncoupled, and when the train stopped that car was two or three car lengths in front of the rear section, and three or four car lengths behind the head section of the train. Plaintiff then saw that a certain plate attached to the draw bar at the front end of said rear car was broken, causing the cars to uncouple. He got another plate and then gave a signal which meant "stand still until you get another signal". He testified that Pflaeger answered the signal, that the engineer did not, but that the engineer could have seen the signal if he was looking, as the track was straight. Plaintiff and Kelner, the rear brakeman, then began to put in the new plate. They had been so engaged about ten minutes when, without any notice or warning, the front section of the train came back against the standing car, and plaintiff's arm was caught between the cars and so injured that it was necessary to amputate it.

WILLIAM L. REED and E. P. H. WEST, for appellant;
WM. J. HENLEY, of counsel.

JAMES C. McSHANE, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The contention of appellee that as the defendant urged but one ground in support of its motion to direct a verdict, it should, as appellant here, be confined to that ground, cannot be sustained. The motion was denied, the cause submitted to the jury and a motion for a new trial, on the ground, *inter alia*, that the verdict was contrary to the evidence, was overruled. The error assigned here, that the trial court erred, "in denying defendant's motion for a new trial", brings before us for review the question of the sufficiency of the evidence to support the verdict.

From the evidence the jury might, in our opinion,

properly find that the plaintiff was not guilty of contributory negligence, and had not assumed the risk of injury from the negligence of Pflaeger.

The members of the switching crew were fellow-servants. To recover the plaintiff was bound to prove: that Pflaeger was an incompetent and unfit switchman; that defendant was negligent in retaining him in its service; that Pflaeger was guilty of negligence, and that his negligence was the proximate cause of plaintiff's injury.

We think that, from the evidence, the jury might properly find, that the backing of the front section of the train against the standing car, under the circumstances shown by the evidence, was an act of negligence; that such act of negligence was the direct and proximate cause of plaintiff's injuries; that Pflaeger was an incompetent and unfit switchman, and that defendant was negligent in retaining him in its service as a switchman.

The case turns on the question, whether from the evidence, the jury might properly find that it was through the negligence of Pflaeger, that the head section of the train was backed against the standing car.

Plaintiff was the only one of the switching crew who testified at the trial. In the course of his examination he stated that Pflaeger gave a signal to back up; counsel for defendant said, "I object"; counsel for plaintiff asked: "Did you see the signal?" Plaintiff answered "No, sir". Counsel for plaintiff then said "Well, of course, you only know from hearsay what happened."

We think the statement of plaintiff that Pflaeger gave a signal to back up must be disregarded, although there was no formal motion to strike it out.

There is in the record no competent direct evidence tending to show that Pflaeger gave any signal or other direction to the engineer to back up. For appellee it is contended that from the facts and circumstances proved the jury might infer that Pflaeger gave such

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signal or direction. But the hypothesis that the engineer backed up without a signal from Pflaeger, is as consistent with all that the evidence proved or tended to prove as the hypothesis that Pflaeger gave him a signal to back up.

In his work on evidence Starkie, speaking of circumstantial evidence, says: "Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof". 1 Starkie Ev., 444. In *Cotton v. Wood*, 8 C. B. N. S., 98 E. C. L. 568, Mr. Justice Williams said, p. 573: "There is another rule of the law of evidence which is of the first importance, and is fully established in all of the courts, viz.: that where the evidence is equally consistent with either view—with the existence or non-existence of negligence—it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of".

Appellee contends that if the engineer started to back his engine, without receiving a signal from Pflaeger, Pflaeger was negligent in failing to give him a signal to stop, or warning plaintiff that the train was coming towards him. The facts proved do not exclude the hypothesis that if the engineer started to back his engine without receiving a signal from Pflaeger, he might have refused or neglected to obey a signal to stop, if Pflaeger gave one.

There is no evidence from which the jury might properly find that if the engineer backed up without any signal, Pflaeger could have warned the plaintiff that the train was coming towards him in time to avoid injury. He could not have warned him by signal with his lantern, for plaintiff and Kelner were not looking towards the head of the train, but were at work, and the first that either saw of the approaching

train was when Kelner saw a reflection of his lantern in a wheel of the approaching car; nor by calling to him, for Pflaeger was twenty or more car-lengths away from plaintiff, and a train was passing by on another track.

Appellee further contends that as the evidence tended to prove that either Pflaeger or the engineer was guilty of negligence which directly caused plaintiff's injury, and further tended to prove that Pflaeger was an incompetent and unfit switchman, and there was no evidence tending to show that the engineer was incompetent or unfit, the jury might from such evidence draw the conclusion, or inference, that on the occasion in question Pflaeger, and not the engineer, was negligent. The cases cited do not support this contention.

Proof of previous acts of negligence, or of the bad reputation of Pflaeger, was not admissible as tending to show that he was negligent at the time in question, nor could the jury, from such proof, properly draw the conclusion that he was then guilty of negligence. 1 Bailey M. & S., Sec. 1507; P., F. W. & C. Ry. Co. v. Ruby, 38 Ind. 294, 312.

The proof shows that the engineer was in the office of defendant's counsel during the first day of the trial, and that at the close of the day he was not directed to return. The second day plaintiff's counsel requested defendant's counsel to produce the engineer, and they declined to do so and stated that he was not then at their office. The engineer was not then in the service of the defendant. We do not think that from this evidence any inference of fact unfavorable to the defendant could properly be drawn by the jury.

A careful examination of the evidence leads us to the conclusion that the evidence is not sufficient to support the verdict, and the judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

Flanagan v. Chicago City Railway Company, 145 App. 56.

George H. Flanagan, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 14,190.

1. **INSTRUCTIONS**—*when refusal to give, not error.* It is not error to refuse a correct instruction the substance of which is contained in another given.

2. **NEGLIGENCE**—*when motorman guilty of.* Held, under the evidence in this case that the jury were justified in finding that the motorman in charge of the car which came into collision with the plaintiff's wagon was guilty of negligence.

3. **VERDICT**—*when not excessive.* A verdict for \$5000 in an action for personal injuries held not excessive where it appeared that the plaintiff at the time of his injury was 29 years of age, was strong and well and was then earning \$15 per week, and that from the time of such injury to the trial, four years later, he had been unable to do but very little work, had earned only \$200, had lost 20 pounds in weight, and had suffered as a result of the accident an injury to his spine, etc.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed December 4, 1908.

Statement by the Court. This is an appeal by the defendant from a judgment for \$5,000 for personal injuries alleged by the plaintiff to have been sustained by him through the negligence of the defendant. Defendant operated a double-track electric street railway in Forty-seventh street, and plaintiff was the driver of a baker's wagon. A west-bound car of defendant, running in the north track, in Forty-seventh street, between half past three and four o'clock in the morning of April 26, 1903, struck the wagon which plaintiff was driving, and in such collision the plaintiff sustained the injuries complained of.

CALHOUN, LYFORD & SHEEAN, for appellant; W. J. HYNES, of counsel.

BULKLEY, GRAY & MORE, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The defendant put in evidence an ordinance making it unlawful for the driver of a wagon to use the streets after 8 P. M., "without having displayed" one or more lights or lanterns. Plaintiff testified that he had a light on his wagon, and the motorman that he saw no light on the wagon.

The court refused to give for the defendant the following instruction:

"B. The court further instructs the jury as a matter of law, that under the ordinance of the City of Chicago which is in evidence in this case, it was negligence as matter of law for the plaintiff to drive upon 47th street at the time and place in question without having displayed upon his wagon one or more lights or lanterns. If, therefore, you believe from the evidence that the plaintiff, at the time and place in question, did not have displayed one or more lights or lanterns upon his wagon, and if you further believe from the evidence that such failure, if any, on the part of the plaintiff contributed in any degree to bring about the collision in question, it is your duty to find the defendant not guilty."

The instruction assumes that plaintiff had no light displayed on his wagon, and for that reason it was not error to refuse it. Whether plaintiff had a light displayed on his wagon was, we think, on the evidence a question of fact for the jury which must be regarded as settled by the verdict.

The substance of refused instruction D was given in defendant's instruction 8, and the defendant therefore was not prejudiced by the refusal to give instruction D.

The court also refused to give for the defendant the following instruction:

"G. The court further instructs the jury that it is not every accident that makes a street railway company liable for damages to the person injured. If an accident is unavoidable, then no liability is incurred;

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and if the jury believe from the evidence in this case that so far as the street railway company is concerned the collision proved was unavoidable, then the plaintiff cannot recover, and the jury should find the defendant not guilty”.

If, “so far as the defendant was concerned the accident was unavoidable”, then the defendant was not guilty of negligence. The court, in instruction 11, given for the defendant, told the jury that the burden of proving that the defendant was guilty of negligence was on the plaintiff and if, “by said rule he has failed to establish his case, it is the duty of the jury to find the defendant not guilty”. We do not think that the judgment should be reversed because of the refusal to give said instruction.

Appellant insists that the evidence fails to prove, either that the defendant was guilty of negligence, or that the plaintiff was in the exercise of reasonable care for his own safety, and that the verdict is therefore against the evidence. One of the acts of negligence averred in the declaration, was that the defendant failed to have a headlight at the front end of the car. Plaintiff and two witnesses called by him testified that soon after the collision the motorman took a headlight from the rear end of the car in question and placed it at the front end. Heise, a passenger on the car, called by the defendant, testified that soon after the collision he found a broken headlight lantern under the front end of the car; that he saw the motorman take a headlight from the rear end of the car and place it at the front end. The conductor and the motorman, also called by the defendant, testified that as was the custom on that run, there was a headlight at each end of the car; that in the collision the front headlight lantern was broken; that the motorman then took the headlight which was at the rear end of the car and placed it at the front end. The testimony of the conductor and motorman does not conflict with the testimony of the plaintiff and his witnesses. The

conductor and motorman state additional facts, viz.: that before the collision there was a headlight at each end of the car; that the front headlight was broken in the collision and the rear headlight was then put in its place. Heise's testimony tends to corroborate the testimony of the conductor and motorman. There is nothing in the testimony of plaintiff's witnesses, that tends to contradict the testimony of the conductor and motorman as to the additional facts stated by them. Their testimony, that before the collision there was a headlight at each end of the car, is uncontradicted either by positive testimony, or by circumstances, is not inherently improbable, and the jury could not properly reject it. *Larson v. Glos*, 235 Ill. 584.

We think that the jury could not, from the evidence, properly infer or conclude that at the time of the collision there was no headlight at the front end of the car.

Other counts of the declaration aver that the defendant so negligently ran, managed and operated its said car that it struck plaintiff's wagon, etc. Plaintiff testified that when he made his last stop before the collision, his wagon was on the south side of Forty-seventh street, south of the south track and about seventy feet west of Wallace street, headed west; that his next stop was to be on the north side of that street some distance farther west; that as he got into his wagon he looked both east and west and saw nothing in the street; that he did not look again to the east before the collision; that he started to drive across the street diagonally, northwesterly, and drove in that direction until his horse was across the north track, his wagon on that track, when it was struck by the car; that he had gone sixty feet west, and nearly across the street diagonally, before the collision occurred; that his horse was walking; that the street was forty-two feet wide; that it was thirteen feet from the curb to the south rail of the south track, about five

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feet between rails and about that distance between the tracks.

The motorman testified that when he first saw the wagon it was thirty-five or forty feet away, going west in the south track; that he then sounded his gong; that when the car was fifteen or twenty feet from the wagon, the horse turned to the north; that he then applied his brakes and was unable to stop in time to avoid striking the wagon; that the speed of the car was about twelve miles per hour; that at that speed he could stop his car in forty or fifty feet.

But one car ran in said street at that hour of the night, and it made two trips per hour. Plaintiff testified that he had seen a car pass by about that time of the night, but did not know at what time it passed. Whether plaintiff drove northwesterly, diagonally across the street from the time he started, as he testified, or drove some distance west in the south track and then turned to the north, as the motorman testified, was a question for the jury. Plaintiff looked both east and west just before starting, and saw nothing in the street. Whether under the circumstances shown by the evidence, he was guilty of contributory negligence in driving on to the north track; without again looking to the east, was, we think, a question for the jury on which their finding should not be disturbed.

The collision occurred in the night. No witness testified as to the distance at which a wagon could be seen at that time. The motorman testified that when he saw the wagon, it was thirty-five or forty feet away. If the night was so dark that he could not see a wagon until it was within thirty-five or forty feet and, at the rate he was going, his car could not be stopped in less than forty or fifty feet, from such facts the inference might be drawn that the rate of speed was so high as to be dangerous. *Chicago City Ry. Co. v. Bennett*, 214 Ill. 26.

From the evidence, as has been said, the jury might properly find that the wagon at no time went west in

the south track, but from the time it started until the collision, went northwesterly, diagonally across the street. The motorman, according to his testimony, did not apply his brakes when he first saw the wagon, but rang his gong and went forward twenty feet before he applied his brakes. The motorman's testimony as to the distance his car was from the wagon, when he first saw the wagon, and the distance his car ran after he saw the wagon before he made an effort to stop the car, were necessarily only estimates of such distances. He estimated the distance between the car and wagon at about forty feet, "thirty-five to forty feet", and testified that he could stop his car in forty to fifty feet.

We cannot say that on the evidence in this record, the jury might not properly find that the defendant negligently ran and operated said car, and that by such negligence plaintiff was injured.

The trial took place in May, 1907, four years after plaintiff was injured. He was, when injured, twenty-nine years old, was strong and well and was then earning \$15 per week. He testified that from the time of his injury to the trial, he had been able to do very little, had earned only \$200, and lost twenty pounds in weight; that in December, 1906, he went to work for Siegel, Cooper and Co., and worked there until three weeks before the trial; that he was compelled to give up that position on account of his condition.

A physician who treated plaintiff for about two months after his injury, testified that his symptoms indicated an injury to the spine; that in his opinion the effect of such injury would incapacitate him to a great extent from performing manual labor, by weakening his spine. Another physician who examined plaintiff in June, 1903, and again just before the trial, testified that in his opinion the effect of plaintiff's injuries was to diminish his ability to follow the ordinary vocations of life; and that he was then able to do manual labor only to a limited extent.

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We do not think on the evidence the damages awarded plaintiff can be held excessive. We think that the record is free from error, and the judgment of the Circuit Court will be affirmed.

Affirmed.

Philip C. Dyrenforth et al., Appellees, v. The Palmer Pneumatic Tire Company, Appellant.

Gen. No. 14,198.

1. **CONTRACTS**—*what sufficient consideration to support novation.* The making of a concession and the incurring of a new obligation is a sufficient consideration to support a novation.

2. **SALES**—*when transaction within legal definition of.* A transfer by one company of its business and assets to another, the same to be paid for in quarterly instalments, is a legal sale even though a provision is made that in the event of the happening of a particular contingency the obligation to make further payments becomes extinguished.

3. **ATTORNEY AND CLIENT**—*what not threat to disclose confidential communications.* Held, that the letter in evidence in this case was not a threat to disclose confidential communications.

4. **STATUTE OF FRAUDS**—*what takes case out of.* Part performance of a contract not to be performed within a year, takes the same without the Statute of Frauds.

Bill in chancery. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. **Affirmed.** Opinion filed December 4, 1908.

Statement by the Court. Appellees, complainants in the Circuit Court, are patent lawyers in Chicago. The Palmer Pneumatic Tire Company, the appellant, was organized in 1892, and from the time of its organization appellees were its patent lawyers. It was the owner of a number of patents relating to pneumatic tires which had been issued to John F. Palmer, and by him assigned to said company, and of some

unimportant patents assigned to it by other persons. The business of the company was the sale of pneumatic tires which were manufactured for it, under said patents, by the B. F. Goodrich Company.

September 26, 1898, said Palmer company transferred all of its property, patents, business, good-will, etc., to the Goodrich company, in consideration of an agreement by that company to pay to it \$394,750, payable in quarterly installments of \$8,750 each, on the first days of October, January, April and July in each year for the next eleven years, beginning October 1, 1898, and ending October 1, 1909, and a further sum of \$1,000 January 1, 1910.

The relief demanded by complainants in their bill was based on their allegations that the Palmer company, in October, 1898, made with them an arrangement to pay to them, as their compensation for their services in negotiating such agreement with the Goodrich company, ten per cent. of the amounts paid by the Goodrich company, one-half, five per cent., payable as said installments were received by the Palmer company from the Goodrich company, and the remaining one-half, five per cent., on the whole amount so received by appellant from the Goodrich company when the final payment was made by the Goodrich company. The Goodrich company paid to the Palmer company each installment as it fell due. The Palmer company paid to complainants five per cent. of each installment so received by it, down to and including the installment due July 1, 1905. On its refusal to make any further payments, the bill in this case was filed by complainants against the Palmer company, the Goodrich company, John F. Palmer, and John S. Driver, defendants, to compel the Palmer company to make the payments it had agreed to make to complainants. The Palmer company answered the bill and filed a cross-bill against complainants, which was answered by them. After replications the cause was referred to a master to take and report the proofs

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with his conclusions. To the master's draft report the Palmer company filed ninety-seven objections, which were all overruled by the master. The objections were ordered to stand as exceptions to the report. The decree overruled said exceptions and decreed, in accordance with the findings and recommendations of the master, that the Palmer company pay to complainants \$2,739.05, being five per cent. on the six installments paid to the Palmer company by the Goodrich company from and including October 1, 1905, to and including January 1, 1907, with interest to May 20, 1907, the date of the report, and that it pay five per cent. of each installment paid by the Goodrich company after January, 1907, from time to time as such payments are made, and that, on the final payment being made by the Goodrich company to the Palmer company, that company pay to complainants five per cent. of the total payments which shall have been made by the Goodrich company to the Palmer company under said contract. The decree dismissed the bill as to the defendants Palmer and Driver, and dismissed the cross-bill of the Palmer company for want of equity.

From this decree the Palmer company prosecutes this appeal.

HIRAM T. GILBERT, for appellant.

GEORGE A. CHBITTON, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

This dispute between the parties on their appeal is thus stated in the brief of counsel for appellant:

"That Palmer and Driver, in October, 1898, made an oral agreement with the complainants by the terms of which the complainants were to receive five per cent. on each payment made by the Goodrich company, as made, and an additional five per cent. of the

total payments when completed, and were to perform, without charge, all necessary professional services for the Palmer company in any litigation which might arise between that company and the Goodrich company growing out of the contract between them, is not disputed. The dispute between the parties is as to whether that oral agreement is binding upon the Palmer company''.

The first reason why that agreement is not binding on the Palmer company, stated in appellant's brief is that: "The compensation agreed upon was exorbitant." There is no direct evidence in the record as to the usual rate of commissions charged and paid for negotiating transactions of the nature of the transaction between the Palmer company and the Goodrich company. Douglas Dyrenforth, one of the complainants, told Driver, at the outset, in answer to his question as to what would be a fair compensation, that he had found on inquiry that the commissions for that kind of work varied all the way from a half downwards; that 33 $\frac{1}{3}$ per cent. was a very common commission. We do not think that in the absence of any evidence that a commission of ten per cent. was greater than the usual and customary commissions for such transactions, that the compensation agreed on by the parties can be held exorbitant.

Appellant next insists that: "The settlement cannot be supported as being a compromise of a disputed claim" and also that: "The settlement cannot be supported as being based upon a consideration in addition to the services in respect to the sale to the Goodrich company''.

The contention of complainants was, that in April, 1898, the Palmer company agreed to pay complainants, in case Douglas Dyrenforth succeeded in effecting a sale of the property of the Palmer company, a commission of ten per cent.; in case he succeeded in effecting a license, a commission of five per cent.; that the transaction between the two corporations was in

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effect a sale; that Douglas Dyrenforth had taken part in negotiating and effecting such sale; that complainants were entitled to receive ten per cent. of each payment when made to the Palmer company, and were under no obligation to render any services in case of litigation in relation to the transaction. Under the new agreement the time of payment of one-half of their compensation was postponed until the final payment should be made, and they agreed to perform, without charge, all necessary professional services for the Palmer company in any litigation that might arise between that company and the Goodrich company growing out of that contract. The complainants made a substantial concession from their claim, in favor of the Palmer company in agreeing to postpone the payment of one-half of their compensation, and incurred a new obligation by their agreement, in a certain contingency, to render to the Palmer company professional services without charge. We think that the making of such concession and the incurring of such new obligation constitute a sufficient consideration to support the new agreement made by the parties.

The next reason stated is that: "The settlement was not binding upon the Palmer company because the complainants misrepresented the legal effect of the contract between the Palmer company and the Goodrich company".

The misrepresentation alleged is that complainants represented to Palmer and Driver that the transaction between the two corporations constituted a sale. One question in dispute was, whether said transaction amounted to a sale or only a license. Appellant's counsel say that: "Instead of being a sale as that term is ordinarily understood, the transaction between the Palmer company and the Goodrich company was a contract by which the Palmer company agreed to transfer and convey its property to the Goodrich company and the latter agreed to accept the transfer and conveyance and, in consideration thereof, to pay to the

Palmer company \$35,000 per annum in quarterly payments during a period of eleven years, and an additional \$1,000 on January 10, 1910, if there should in the meantime be no decision of the United States Circuit Court of Appeals declaring patent No. 489,714 and re-issue No. 11,677 invalid."

The instruments executed by the Palmer company in terms state that said company had sold, assigned, transferred and set over to the Goodrich company the patents and other property of said company. There is, it is true, in the contract between said corporations a provision that, in case a certain patent should be declared, "void or invalid", then the Goodrich company, "may refuse to make and be released from further payments", under said contract.

We do not think that the complainants misrepresented the nature of the transaction in stating that it amounted to a sale rather than a license.

Again it is clear that Palmer and Driver were not led or influenced to make the agreement by the statements of complainants that the transaction between the two corporations amounted to a sale. Philip C. Dyrenforth, one of the complainants, testified that at the meeting between complainants and Palmer and Driver at which the agreement was made, he stated his opinion that the transaction was in effect a contract of sale, and Palmer and Driver stated that it was a license, and further testified as follows: "I said to Mr. Driver and to Mr. Palmer: 'Gentlemen, I think I have a suggestion which may overcome all of this difficulty.' I said: 'The issue seems to be only whether this document, the contract with the B. F. Goodrich company, constitutes an out-and-out sale or merely a license.' I said: 'Now, that has been discussed between us and you have said what you have to say in the matter; we have said what we have to say in the matter', and I said, 'There is no desire apparently to submit this matter to a court for consideration.'

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“Q. Had that been suggested? A. There had been some suggestion of that kind, and Mr. Driver was particularly opposed to anything of that kind. I said, ‘Whether this is a sale or a license, due to the contingency, the event will prove.’ I said, ‘If the B. F. Goodrich Company continues, throughout the life of the patent, to pay The Palmer Pneumatic Tire Company what it has agreed to pay, or in any other event, The Palmer Pneumatic Tire Company gets from the B. F. Goodrich Company all that the contract calls for, it is perfectly obvious that it is a sale; it has that effect.’ I said, ‘I have therefore suggested to my brother, W. H., and he has acquiesced in it, that you pay from now on five per cent. instead of ten per cent. of the contract price, and if at the time of the expiration of the patent, the full purchase price has been paid, then you pay us, in a lump sum, the other five per cent.’ Mr. Driver spoke up and he said: ‘I think that is a very fair proposition.’ He said: ‘I am in favor of that; what do you say, Mr. Palmer?’ And Mr. Palmer said that he thought that was satisfactory, too. That was the agreement that was entered into then and there.”

William H. Dyrenforth testified substantially to the same effect, and their testimony was not contradicted. If it be assumed that the transaction between the two corporations was in effect a license and not a sale, still as Palmer and Driver were not led or influenced to make the new agreement by the statement of complainants that said transaction was a sale and not a license, the new agreement cannot be held invalid because of such statements.

The fourth reason stated in the brief of appellant, why the new agreement should be held invalid, is that: “The relation of attorneys and clients existing between the complainants and the Palmer company, Palmer and Driver, rendered it impossible for the complainants to enter into a contract with their clients unless such contract was equitable and just.”

The finding of the decree is that the said compromise agreement between the complainants and the Palmer company was entered into by Palmer and Driver on behalf of said company: "freely and voluntarily with a full knowledge of all the facts, and the said complainants used no influence or duress of any kind whatsoever * * * , that the amount so agreed to be paid was reasonable, equitable and just under all the circumstances." Substantially the same conclusions are stated by the master in his report.

We think that the conclusion thus reached and stated by the master and the chancellor are just and proper on the evidence, and that conceding that the rule of law stated by appellant was applicable to the parties when, late in October, 1898, the compromise agreement was made, that agreement is valid and binding on the Palmer company.

The only other reason stated in the brief of appellant why said agreement was not binding on the Palmer company is that: "The court cannot permit the settlement to stand, in view of the letter of Douglas Dyrenforth of September 30, 1898." The letter referred to is as follows:

"Sept. 30, 1898.

JOHN F. PALMER, Esq.,
133 So. Clinton St., City.

DEAR SIR:—After a day and a night's consideration I have been unable to overcome the aversion of my partners to enter suit against a client. They fully agree with me, however, that your course in refusing to pay 10%, if adhered to, would evidence a shameless ingratitude. If you can enjoy your position you are welcome to it. For myself I need only to say that if you think it to your interest to sacrifice my good-will and friendship, both of which have been valuable to you in the past, so that you can increase your income 5%, why, make the most of it.

You ought to remember that the Astor House talk only settled that the original commission contract was in force and that I was not to be limited to a *per diem*.

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You thought that as you had done that work of carrying out my plans I should not be further recognized in the matter. This I resented and you came down. Then I did all the rest of the work myself, as originally contemplated, and am hence entitled to the compensation originally agreed upon.

I have caused my expenses to New York to be itemized, and herewith enclose a memorandum of same, the difference between which amount and \$425 drawn by me from Mr. Griffith, please deduct from the first payment due us.

In behalf of the B. F. Goodrich Company this office will send to you for execution certain documents; and as soon as our clerks can arrange your papers they will be sent to you for such disposition as may be proper.

Yours respectfully,

DOUGLAS DYRENFORTH.

P. S. The matter may be too delicate for you to appreciate, but I will say that a controlling reason why my firm objects to litigation with you is that to succeed we would have to make public confidential matters; and while their preservation is to your interest, we would rather sacrifice the money than alter our usual practice as professional men. D. D."

The contention of appellant is that this letter contains, "a veiled threat", to reveal confidential matters, and that Palmer did not then know and was not informed until just before his company ceased to make payments under said agreement in 1905, that an attorney was not permitted to reveal confidential matters. We find in this letter no language that can properly be construed to amount to a threat to reveal confidential matters. As to this letter we concur in the conclusion stated by the master in his report, and by the chancellor in the decree: "that this letter of September 30, 1898, was not a threat to institute litigation against said defendant, but that, on the contrary, it was a distinct statement that nothing further would be done by the complainants with respect to any such litigation, and that said five per cent. would be ac-

cepted; that this letter was not, under all the circumstances, such a letter as was calculated to arouse apprehension on the part of said John F. Palmer and E. A. Driver, representing The Palmer Pneumatic Tire Company, of injurious results from refusing to accede to the demands of the complainants, and could not, and as a matter of fact did not, arouse any such apprehension on their part."

Neither in the subsequent correspondence nor in the interview at the time the compromise agreement was made was there any suggestion that the letter contained a threat.

The negotiations that resulted in the compromise agreement were conducted on the part of the Palmer company by Palmer and Edward A. Driver. That in making said agreement Mr. Driver took the leading part appears from the testimony of Palmer as well as from that of Philip C. and William H. Dyrenforth. On his cross-examination Palmer was asked why the additional five per cent. which it was agreed that the Dyrenforths should have, was made conditional on the payments being made by the Goodrich company, and answered: "On the principle of putting off the evil day as long as we could, I guess", and further testified as follows:

"Q. Was it because of the suggestion of Mr. P. C. Dyrenforth that inasmuch as you thought this was merely a license and not a sale, that if all the payments were made you would be willing to concede that it was a sale and not a license? A. I never was willing to concede anything except the money.

Read the question. (Question read.) Q. You can answer that yes or no? A. In view of my condition of mind that is a very hard question to answer with a yes or no. I had surrendered to Mr. Driver when I went to the office of Dyrenforth & Dyrenforth."

There is nothing in the record tending to show that Mr. Driver found in said letter any suggestion of a threat to reveal confidential matters. He died in 1904,

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and it was not until after his death that the Palmer company refused to carry out said agreement. We think the compromise agreement cannot be held invalid because of said letter.

Appellant further contends that the compromise agreement was invalid under the Statute of Frauds, because it was not in writing and was not to be performed within one year. Conceding that the agreement is within the statute and that the letters of Palmer of November 18, 1898, and February 12, 1903, do not constitute a sufficient note or memorandum in writing of said agreement, there was, in our opinion, a sufficient part performance of said agreement by the Palmer company to take it out of the statute.

On the proofs the complainants, in our opinion, are entitled to the relief granted by the decree, and the decree will be affirmed.

Affirmed.

Gust Kavooras, Defendant in Error, v. E. L. Hasler Co., Plaintiff in Error.

Gen. No. 14,206.

1. **AMENDMENTS AND JEOPAILS**—*what authorizes nunc pro tunc order.* If a party upon a trial has been permitted to make an amendment, there is sufficient justification for the entry subsequently of a *nunc pro tunc* order formally authorizing such amendment.

2. **VERDICT**—*when not disturbed as against the evidence.* A verdict not manifestly against the weight of the evidence will not be set aside on appeal.

Assumpsit. Error to the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. **Affirmed.** Opinion filed December 4, 1908.

GEORGE J. KAPPES, for plaintiff in error.

No appearance by defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

This is a writ of error by the defendant to reverse a judgment recovered against it by the defendant in error for \$37.50 in the Municipal Court, in an action of the fourth class. The original statement of claim is as follows: "Plaintiff's claim is for money advanced for fruit condemned by the Health Inspectors of the City of Chicago as unfit for use on or about August 14, 1907."

The bill of exceptions states that September 12, 1907, at the close of plaintiff's case: "the defendant moved to dismiss the suit, for the reason that the plaintiff's case, as proven, varied from his bill of particulars on file: whereupon the court permitted the plaintiff to amend"; and further states that at the next session of the court, September 14, 1907, the defendant moved to strike out certain evidence, and that the court then gave to the attorney of the plaintiff the bill of particulars, and he thereupon added the following amendment: "And for money advanced to the defendants for fruit which defendants refused and failed to deliver but substituted other fruit which was unfit for use." No order giving leave to amend was entered until November 13, 1907, when an order was made giving: "plaintiff leave to amend his bill of particulars *nunc pro tunc* as of September 14, 1907". We think that the action of the court during the trial, stated in the bill of exceptions, amounted to giving plaintiff leave to amend his bill of particulars; that the court, by reason thereof, had power and authority on November 13, to enter the formal order giving leave to amend *nunc pro tunc* as of September 14, and that the amendment to the bill of particulars, or statement of claim, is a part of the record.

August 14, 1907, defendant had in front of its store, on a wagon, eighty crates of peaches. Mason, defendant's salesman, told plaintiff that the first thirty crates from

the rear end of the wagon had been sold, and offered him the remainder at \$1.25 per crate. Plaintiff examined the peaches, told Mason that he would take thirty crates; told him to unload said crates, set them to one side in defendant's store, and he would call for them in the afternoon. Mason made out a sales slip and plaintiff paid defendant the price, \$37.50. Mason testified that the plaintiff bought the second thirty crates from the rear end of the wagon, and this testimony was not contradicted by plaintiff. Mason further testified that the peaches were unloaded, that he set aside, in defendant's store, the thirty crates plaintiff had bought, and that said crates remained in the store until plaintiff returned in the afternoon. Plaintiff further testified that when he bought the peaches he marked each crate with his initial "K". This testimony was not contradicted by Mason. In the afternoon plaintiff returned to defendant's store for his peaches, and was shown thirty crates, which were all the peaches then in defendant's store. He testified that the crates then shown him did not have the mark he had put on the crates he had bought, and were not the peaches he had bought and marked.

The disputed question of fact in the case was, whether the thirty crates of peaches plaintiff found in defendant's store in the afternoon were the peaches he had bought in the morning, as defendant contended, or whether defendant had sold that lot of peaches and offered to plaintiff another lot, as plaintiff contended. This question of fact the trial judge found in favor of the contention of the plaintiff. We cannot say that such finding is so manifestly against the evidence as to warrant a reversal of the judgment on that ground.

It is clear, we think, that the transaction in the morning was an actual present sale of the second thirty crates of peaches from the rear end of defendant's wagon. The price was agreed on, was paid, the specific crates sold were designated, agreed on and set aside. If defendant resold the thirty crates of

peaches so bought by the plaintiff, then it became liable to the plaintiff, in trover, for their value, or plaintiff might waive the tort and recover in assumpsit their value. The trial court in effect found that the defendant resold the peaches it had sold to the plaintiff, and the plaintiff was therefore entitled to recover from the defendant the value of said peaches.

The original statement of plaintiff's demand must be disregarded, for it states no demand, no cause of action against defendant. The amendment, though defective in form, informed the defendant that it was called on to defend a charge that it had refused and failed to deliver fruit to the plaintiff. We think it may be regarded as a statement of the demand which the court found was proven by the evidence, and sufficient to support the judgment.

Finding in the record no substantial error, the judgment of the Municipal Court will be affirmed.

Affirmed.

Elizabeth L. Nix, Appellee, v. Milton L. Thackaberry,
Appellant.

Gen. No. 14,165.

1. EMINENT DOMAIN—*effect of judgment in condemnation upon lien of trust deed.* A judgment in condemnation transfers the lien of the trust deed from the land to the fund awarded; a release by the trustee in the trust deed is not necessary; likewise, the owner of the debt secured can only be charged with the amount actually paid under the condemnation judgment.

2. FORECLOSURE—*what allowance of solicitor's fees proper.* Held, in a foreclosure proceeding that an allowance of \$1,000 by way of solicitor's fees was proper.

3. FORECLOSURE—*when decree directing particular order of sale proper.* Held, that the decree or order of foreclosure entered in this case providing for the sale of the property foreclosed in a particular order as to lots, was proper.

NIX v. Thackaberry, 145 App. 75.

Foreclosure. Appeal from the Circuit Court of Superior county; the Hon. WILLARD M. McEWEN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed December 4, 1908.

WILLIAM B. MOAK, for appellant.

H. J. ROSENBERG, for appellee; MAX M. GROSSMAN, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

The bill in this case is a bill to foreclose a trust deed in the nature of a mortgage dated January 13, 1904, given by appellant to secure his principal note of that date for \$40,000, payable three years after date, with interest at six per cent., payable semi-annually until maturity, and with interest after maturity until paid, at the highest rate of interest it was then in such case lawful to contract for, and his six interest notes for \$1,200 each, of the same date, one payable at the end of each successive six months after date, with the same provision as to the rate of interest after maturity as the principal note, all of which notes were payable to the order of the maker, and by him endorsed in blank. The cause was, on the motion of appellant, referred to a master to take and report the proofs and his findings. Appellant took a large number of exceptions to the draft report which were overruled by the master, and the decree approves the report and overrules all exceptions thereto. From the decree only the mortgagor appealed.

We think that the contention of appellant that complainant was not the owner of the notes secured by said trust deed cannot, on the proofs, be sustained.

Certain of the lots included in the trust deed were taken by the city of Chicago for school purposes; the value thereof ascertained by a jury; the money paid to the county treasurer; and by him paid to complainant and credited on said principal note. The

trustee released said lots. Appellant contends that because, under the provisions of the trust deed, the trustee was not authorized to release said lots on the payment of any sum less than \$12,000, that therefore the complainant should be charged with \$12,000, because of such release, although the amount of the condemnation money, less certain taxes on said lots paid out of said money, was \$7,688.79.

The effect of the judgment was to transfer the lien of the trust deed from the land to the fund awarded. No formal release by the trustee was necessary. *Stopp v. Wilt*, 76 Ill. App. 531; S. C. 177 Ill. 620.

We think that appellant was only entitled to have the sum actually received by complainant credited on his notes.

In the brief of appellee it is stated, that appellee has: "Conceded from the beginning of this litigation that any defence which is good as against Charles H. Nix, the husband of appellee, is good as against appellee".

The proofs do not, in our opinion, show that Charles H. Nix was indebted to appellant in any sum whatever.

Appellant testified that he and Charles H. Nix agreed at a certain time that the amount due complainant, in excess of the principal sum of \$40,000, was \$3,000. Nix testified that no such agreement was made. The master found, and the court has approved his finding, that no such agreement was made. If any such agreement was made, the \$3,000 was not paid by appellant.

We do not think that, on the evidence, appellant is entitled to have the decree reversed or modified by reason of his claim that he made such an agreement with Charles H. Nix, as he testified that he made.

Appellant further contends that he made a deed conveying lots 18 and 19 in block 15, to William Eckhart, who was to pay \$1,000 therefor, and gave said deed to Charles H. Nix, to deliver on payment of said sum. The evidence fails to show that said deed was ever de-

livered to Eckhart, or that the purchase money was paid to Nix. The decree provides that: "Nothing in this decree contained shall in any way prejudice any right which Milton L. Thackaberry may have against Charles H. Nix, or any one else by reason of the execution by said Thackaberry of a deed in which William Eckhart is grantee to lots 18 and 19 in block 15".

We do not think that appellant was, on the proofs, entitled to any credit on his notes on account of said transaction.

The trust deed gave the holder of the notes secured by the trust deed the right to declare all the notes due in case of failure to pay any note at maturity. Defendant made default in payment of certain interest notes; complainant declared all the notes due and filed this bill May 22, 1906. The \$7,688.79 was paid to complainant May 26, 1906, and then indorsed on the principal note, leaving the balance then due on said note \$32,311.21. Interest was computed by the master at the rate of six per cent. on \$40,000 from January 13, 1906, to May 22, 1906, and at six per cent. on said sum from May 22 to May 26, 1906, and on \$32,311.21 from that time until March 26, 1907, the date of his report. On the three interest notes for \$1,200 each due respectively January 13, 1905, July 13, 1905, and January 13, 1906, interest was computed at seven per cent. from maturity to March 26, 1907, and at the same rate on amounts paid for taxes from time of payment to March 26, 1907.

The master found that the amount due March 26, 1907, was \$40,407.61. The decree entered August 9, 1907, finds that sum is due with interest from March 26, 1907. We do not think that appellant has any just ground to complain of this computation of interest. While its effect is to allow interest on the interest found to be due March 26, 1907, its effect is also to reduce the rate of interest from seven to six

per cent. from March 26, 1907, to the date of the decree, on the whole debt.

The contention of the appellant that the decree allows complainant amounts paid for taxes on lots not included in the mortgage, finds no support in the proofs.

The trust deed provides that the complainant shall be allowed, in case of foreclosure, a reasonable solicitor's fee and expenses of bringing down the abstract. She was allowed by the decree a solicitor's fee of \$1,000, and for abstract \$15.30. We think that both allowances, on the proofs, are proper.

June 14, 1907, appellant filed a cross bill and a supplemental answer. August 8, 1907, after the court had announced the decision and directed that a decree be prepared, appellant moved for a rule on complainant to answer the cross-bill. The court denied his motion and dismissed the cross-bill. The facts stated in the cross-bill are also stated in the supplemental answer. The purpose of filing the supplemental answer was to make the answer correspond with the proofs. Appellant did not ask that the cause be again referred, or that he be permitted to introduce further proof. We do not think that appellant was prejudiced by the dismissal of his cross-bill.

April 24, 1906, appellant conveyed to Wickham the greater part of the lots included in the mortgage, subject to said trust deed which was assumed by Wickham.

May 18, 1906, appellee, by Charles H. Nix her attorney in fact, signed a paper reciting an agreement on her part, in case she received a deed to said real estate to convey the same, with the exception of certain lots which Wickham had conveyed, to Wickham on the terms therein stated. We are unable to see how or in what manner appellant's rights were affected by this instrument.

At the time the decree was entered, the title to the equity in the mortgaged premises stood as follows:

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One lot, 27 in block 16, in Foley, to whom it had been conveyed by appellant; certain other lots in appellant; certain other lots in Foley, to whom they had been conveyed by Wickham after the conveyance thereof to him by appellant, above mentioned; the remaining lots and blocks in Wickham.

The decree provides that the master shall sell: first, certain specified lots and blocks, mentioning and describing the lots and blocks so conveyed, to Wickham, which had not been reconveyed by him; second, certain other specified lots, mentioning and describing certain lots included in the said conveyance from appellant to Wickham and by Wickham conveyed to Foley; third, the lots which had not been conveyed by appellant; fourth, said lot 27 which appellant had conveyed to Foley. As between appellant and Foley, his grantee of lot 27, it was proper to sell appellant's lots before lot 27 was sold, for Foley did not assume the mortgage. We think the court properly ordered that Wickham's property be first sold, and that the lots he had conveyed to Foley be next sold. But however that may be, as between Wickham and Foley, appellant cannot complain, for both Wickham's and Foley's lots are ordered to be sold before appellant's.

We think the record is free from reversible error, and the decree will be affirmed.

Affirmed.

William J. Kelly et al., Appellants, v. Ezra C. Fahrney et al., Appellees.

Gen. No. 14,087.

1. CORPORATIONS—status and duties of officers and directors. The officers and directors of a private corporation are in a fiduciary relation to the corporation and to the stockholders; their duty under the principles of equity is to serve their trust beneficiaries honestly,

faithfully and without negligence, they may not avail themselves of their position for their own gain, profit or advantage when to do so involves negligence of duty, loss of their service or other loss, injury, detriment or disadvantage to the beneficiaries of their trust.

2. CORPORATIONS—*duties of stockholders with respect to each other.* As between one stockholder and another there is also a fiduciary relation and a duty to act honestly and in good faith, so far as the exercise of their powers within the corporation is concerned.

3. CORPORATIONS—*what not duty of stockholder.* There is no duty imposed by law upon a stockholder to use his own individual pecuniary means to assist a corporation in its money difficulties or by use of such means to shield it from financial destruction.

4. CORPORATIONS—*what not breach of duty as stockholder.* No effort by a stockholder with a view merely to collect the money due him from the company by means or according to methods provided by law can be regarded as a breach of any fiduciary relation.

5. MASTERS IN CHANCERY—*effect of findings of fact.* The office of master in chancery is clerical and the duties of a master in chancery are ministerial; the findings of fact by a master in chancery do not conclude and cannot by order of a chancellor be made to conclude either such chancellor or a court of review.

6. EVIDENCE—*effect of judicial record.* In a collateral proceeding the findings of a judicial record cannot be contradicted by parol.

Bill for accounting. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Affirmed. Opinion filed December 4, 1908.

Statement by the Court. September 24, 1901, William J. Kelly, John Kelly, Dan H. Ball, Esther Marion, David B. Coulter, Willard H. Edwards and Ernest Dale Owen, as stockholders in the White Cliffs Portland Cement & Chalk Company of Arkansas, on behalf of themselves and all other stockholders electing to join, filed their bill in the Circuit Court of Cook county. They made parties defendant Peter Fahrney, Ezra C. Fahrney, William H. Fahrney, Guardian Trust Company, a corporation, J. De Goeijen, McDougal Hawkes, John W. Read and the above mentioned White Cliffs Company, an Arkansas corporation. Ezra C. and William H. are sons of Peter Fahrney.

Only the Fahrneys and the White Cliffs Company were served. No one but the Fahrneys made defense and the bill was heard as to them and the corporation only.

By an amendment to the bill E. H. Towar became a party complainant. During the pendency of the cause John Kelly and Dr. Peter Fahrney died. William Kelly, administrator of the estate of John Kelly, was substituted for John Kelly, and J. H. Fahrney, E. H. Fahrney, E. C. Fahrney and W. H. Fahrney, executors of the last will and testament of Peter Fahrney, were substituted for Peter Fahrney, and thus the cause proceeded.

Marriage of Esther Marion and change of her name to Esther Marion Hay was suggested of record.

The prayer of the bill is, "That an account may be taken under the direction of this court of the amount of stock owned by each of your orators or any other complainant jointly herein, if any, and of the value thereof. And that the defendants may each and every one of them be decreed to pay your orators, and such other complainants, if any, whatever sum shall appear to be due from each of them upon the taking of such an account, together with the costs of this proceeding," and for general relief.

The theory of the bill is that the Fahrneys wrecked the White Cliffs Company or participated in the wrecking thereof; and that they did so either while in relation to complainants as officers of the corporation, while co-operating with others in a majority combination of stockholders, or while combining with officers and a majority combination. Peter Fahrney never was an officer of the corporation and never held any stock therein of record. He did hold bonds of the corporation, and whether he was a stockholder not of record is a question. The motive suggested for the wrecking is that the Fahrneys desired to possess themselves of the assets of the corporation. As a matter of fact, undisputed by evidence, when the corporation

finally did fail the Fahrneys obtained none of the assets of the corporation except in that they obtained payment of the bonds thereof which they held.

The bill is designed to show a relation of trust and confidence (with which relation courts of equity are peculiarly concerned) between these complainants and the defendants; to state the particular facts from which arise the specific duties and obligations now involved, and to point out the breaches or violations of fiduciary duty and obligation of which complaint is made. The allegations of the bill and amendments are, in substance:

That the complainants owned stock of the White Cliffs Company as follows: William Kelly 300 shares, John Kelly 4,198 shares, Dan H. Ball 600 shares, Esther Marion 300 shares, David B. Coulter 13,500 shares, Willard H. Edwards 67 shares, Ernest Dale Owen 833 shares and E. H. Towar 100 shares, which holdings amounted to 19,898 shares out of a total of 40,000 shares; that De Goeijen "is the owner or represents as agent and trustee the owners of" 20,100 shares and John W. Read is the owner of 2 shares; that the corporation's capital stock is \$1,000,000, divided into 40,000 shares at \$25 each.

That the Company was the owner of 3,000 acres of land in Arkansas, in part heavily timbered, through which runs Little River, which is at times navigable; that upon this land there is a large and valuable white chalk deposit of 900 acres and adjoining the chalk a deposit of a particular kind of clay which mixed with the chalk, makes the highest grade of Portland Cement, and that upon the property there is a cement manufacturing plant, saw-mill and other valuable improvements.

That on December 31, 1895, the company, for the erection of its plant, issued \$125,000 of bonds secured by trust deed conveying all its property to the Title Guarantee and Trust Company of Chicago; that the bonds bore interest at 6% per annum, payable on the

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first day of January and of July each year, and upon six months default in the payment of interest the bonds might all be declared due; that Ezra C. Fahrney acted for himself and as agent of his father Peter Fahrney, duly authorized, in all affairs concerning the company; that Peter and Ezra C. Fahrney first bought \$100,000 of these bonds and the proceeds were devoted toward the erection of the company's plant; that with the concurrence and largely upon the suggestion of Ezra C. Fahrney the company then determined to make the plant more expensive than at first contemplated, and, more money being therefore required "it was agreed and contracted between the said Ezra C. Fahrney and the said William J. Kelly," then president of the company, "that the said Fahrney should loan to the company" an additional sum of \$20,000 "and would take the \$25,000 of bonds remaining unsold, and certain other choses in action, as collateral security therefor", and would make an additional loan of \$75,000 upon the company's note to mature concurrently with the bonds; that in consideration of this agreement Kelly agreed to and did give said Fahrney a bonus of \$25,000 of the capital stock of the company and Ezra C. Fahrney advanced the \$20,000, received the bonds and collateral and also the \$25,000 of stock; that relying upon these promises of the Fahrneys, "your orators the said Kelly expended the said sum" of \$20,000 for the company and created an indebtedness of the company of more than \$30,000 for machinery, labor, etc.; that the company then had no means with which to complete its plant and the interest due January 1, 1897, on the Fahrney bonds was unpaid, "all of which was expected to be paid" out of the promised \$75,000; that at this time Ezra C. Fahrney was vice president, director and a stockholder of the company, was well aware of its financial affairs and straits and that unless the company could procure cash its property would be sold to satisfy its indebtedness, but when Kelly came to him in Chicago for the \$75,000 he refused to

make such loan; that Ezra C. Fahrney so refused “for the purpose of destroying the said company and to procure the sale of the property thereof on execution or under foreclosure of the said mortgage; that the said Peter Fahrney conspired with the said Ezra C. Fahrney to do such fraudulent and unlawful acts,” it being the sole purpose and intent “to take advantage of the financial situation of the company by refusing to fulfill such contract, to wreck and destroy the company so that they might have the same for their own exclusive and selfish purposes as against your orators”—the said Fahrneys intending to obtain all its property for themselves; that said Peter and Ezra C. Fahrney then gave notice and took the preliminary steps to take advantage of the default in interest upon the bonds with the view of declaring the principal due and payable in order to carry out “their fraudulent designs, as aforesaid”; that Kelly then endeavored to procure other money with which to finish and operate the company’s plant and pay the interest on its bonds, but Ezra C. and Peter Fahrney “then took affirmative and positive means to prevent the said Kelly from consummating his negotiations * * * all for the purpose of wrecking the said company, as aforesaid, for their own purposes and to get the property thereof to themselves”, yet Kelly succeeded in procuring a temporary loan from one William Edenborn for one year on a second mortgage; that when Peter and Ezra C. Fahrney discovered this they sent their agent to Kelly, proposing that he, before its consummation, break his agreement with Edenborn and permit them to make the loan on the same terms, but this Kelly refused and then the Fahrneys, failing in this, “approached the said Edenborn and proposed to him that he should join them, the said Fahrneys, in taking steps to wreck the said property, and proposed to him that they conspire together to that end, so that they might have all the property themselves as against the just rights of your orators, who were at

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that time stockholders in said company," but Edenborn refused; that by the refusal of the Fahrneys to make the \$75,000 loan a delay was occasioned which accumulated interest, taxes and other expenses, so that it became necessary to raise more money than would otherwise have been necessary; that Kelly negotiated in eastern states and elsewhere for a permanent loan to complete and operate the plant, to pay the Edenborn temporary loan of \$50,000, as well as other expenses and interest on the Fahrney bonds; that Kelly obtained subscriptions to a large amount for another bond issue to be made by the company; that among others who so subscribed were George E. Bartol and J. De Goeijen; that Bartol sent and also himself went to the company's plant at White Cliffs, Arkansas, to inspect the company's property and "made certain arrangements and proposed to carry out certain plans agreed upon between him and the said Kelly"; and subsequently, he himself, his attorney and several business associates, "went to White Cliffs for the purpose of carrying out and completing the arrangement so made, as aforesaid, with the said Kelly"; that during the negotiations with Bartol and while he was on his way to the White Cliffs the "Fahrneys sought and had a private interview with the said Bartol in the city of Chicago, and that he there made false and malicious representations against the said Kellys to the said Bartol and very derogatory to them as business men and managers of said property, and proposed to the said Bartol that he should somehow manage to get control of the said property, and that they would then turn the Kellys out and make a combination between themselves for the purpose of getting the entire property to their own personal and selfish purposes, and against the rights and interests of your orators"; that when Bartol reached White Cliffs he refused to carry out his previously made arrangements and insisted upon such modifications as would give him full control of the property pursuant to the sug-

gestions made to him by the Fahrneys, and when the Kellys would not accede he refused to furnish any money to put the company in proper condition to conduct its business; that at that time Ezra C. Fahrney came to White Cliffs with several of his associates and he "openly announced and declared that the Kellys had not yet got any money for the said White Cliffs Company and he proposed to see that they should not", and, assisted by his associates, he had interviews with Bartol and his attorney, whereupon Bartol without any "reasonable excuse" or "real reason", but as a pretense and excuse "falsely pretending that certain misrepresentations had been made to him, which, in fact, had not been so made", refused to carry out his arrangements with the Kellys and left; that Bartol had gone so far in his negotiations as to make the company a temporary loan of \$10,000; that at this time the financial condition of the company was desperate, the Edenborn \$50,000 mortgage was about due, the interest due January 1, 1898, on the Fahrney bonds was still due and in default, the point of time, July 1, 1898, when the principal of those bonds could be declared due and payable, was within about eight weeks, the company had other debts which under the Arkansas law were a lien on part of its property, and "it had no means whatever with which to proceed to carry on its business"; that ten thousand dollars had been paid on the Fahrney bonds, leaving \$115,000 unpaid; that then an agreement was made with De Goeijen for an issue by the company of its consolidated bonds for a sum of \$250,000 of which it was proposed that \$115,000 be set aside to pay the Fahrney first lien bonds when due, and that the remaining \$135,000 be sold and the proceeds used in payment of the Edenborn mortgage, finishing and operating the plant and paying other debts of the company; that taking advantage of the desperate financial condition of the company De Goeijen demanded of the Kellys that of their own personal stock in the company they, as a bonus,

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assign to him \$502,500, that is, a controlling interest; that the Kellys of their own stock gave De Goeijen \$502,500 and he then purchased \$108,000 of the consolidated bonds, leaving \$27,000 of those bonds with the Guardian Trust Company to be used for raising more money if the \$108,000 should be found insufficient for the purposes of the company; that as part of the arrangement with De Goeijen it was agreed that the "Kellys were to have and retain the active management of the said business"; that during Kelly's negotiations for money to pay the Edenborn mortgage and other purposes Ezra C. Fahrney pretending to become friendly with the Kellys and to desire to assist them in raising money for the company, agreed with William Kelly that he would give \$110,000 of his, Ezra C. Fahrney's stock, "as a part of the stock bonus proposed to be offered by the said Kelly" in order to dispose of the consolidated bonds, that is, upon the agreement that if Kelly raised \$100,000 of money or more he, Ezra C., would assign to Kelly such \$110,000 of stock, but that, "further to embarrass the said Kelly and said company, and in furtherance of the schemes and plans attempted to be carried out" by Ezra C. and Peter Fahrney, and without any reason or excuse, Ezra C. Fahrney refused to carry out his agreement; that the interest due on the Fahrney bonds, as well as other obligations of the company, were paid out of the \$108,000 and the plant completed and put in successful operation and cement made and the business promised the greatest prosperity; that by having the necessary means to run it and judicious management the plant could have been made to earn a good profit but the \$108,000 was insufficient to carry the plant to the point of being self-supporting while the \$135,000 "requested by the Kellys" would have been amply sufficient; that the \$108,000 having been expended it was, "on the first day of October following," necessary that an additional \$12,000 should be raised to put the company on a profit basis; that De

Goeijen lived in Amsterdam, Holland, and he "procured" the election of John Scott as president and McDougal Hawkes as a director, both of New York, William J. Kelly "being made" secretary and John Kelly remaining treasurer; that soon after the purchase of the bonds and the procuring of a controlling interest De Goeijen, notwithstanding his agreement "that the Kellys should be and remain in the active management of the said White Cliffs Company", began in various ways to interfere with the same to the detriment of the company, and sent men to be put on the pay-roll of the company who, although employed, were of no use whatever to the company; that secret correspondence and communications were begun by the Fahrneys with De Goeijen, "the purport of which was never revealed to the said Kelly", and by such correspondence and communications and certain interviews between representatives of De Goeijen and the Fahrneys "a conspiracy and plan was entered into to destroy the holdings of the minority stockholders", to cause default in the interest due on the Fahrney and the De Goeijen bonds, to prevent the Kellys from procuring financial assistance or making financial arrangements in any quarter so as to keep the works operating, and, in every way within their power, the Fahrneys and De Goeijen sought to destroy the corporation for their own selfish and personal purposes and to force its property to a sale in order to purchase it, and thus to defraud the minority stockholders and take from them their holdings; that they so unlawfully conspired together, although Hawkes was a director, Ezra C. Fahrney (representing himself and Peter Fahrney) was vice-president and a director, and the said De Goeijen either owned or was the agent and trustee of a majority of the stock; that the interest on the Fahrney bonds due July 1, 1898, remained in default and "about this time" the \$108,000 had been expended for the company and it required about \$12,000 to put the business on a paying basis and to pay the interest in

default and, furthermore, a semi-annual interest installment on the \$108,000 of the consolidated bond issue was coming due and, under the terms of the trust deed securing the bonds, the principal could be declared due, after three months' default; that, for the purpose of raising the money necessary to pay the interest due and to become due on November 1 and money necessary to carry on the company's business, William J. Kelly, with the consent of John Scott, the president, arranged with one Sam Lazarus of St. Louis for a loan of \$12,000 to be secured by the hypothecation of the \$27,000 of consolidated bonds held on deposit by the Guardian Trust Company, and to carry out this arrangement a directors' meeting held in New York on October 24, 1899, authorized the loan by a vote of all the directors present except Hawkes, who voted against it; that De Goeijen, with the aid of Hawkes and the co-operation of the president and the Trust Company, prevented the making of the proposed loan; that this action of De Goeijen was "in furtherance of the design and arrangement and conspiracy which had been formed by him and the said Fahrneys" to prevent payment of interest "with a view of declaring the whole of the bonded indebtedness due and immediately payable and of foreclosing the mortgage securing the same, and to wreck the said company and to destroy the holdings of the minority stockholders to the exclusive benefit of the said De Goeijen and the said Fahrneys"; that at the time of making the arrangement for the loan of \$12,000 the company had on hand a large amount of manufactured cement but it required to be aged and seasoned in the bins for about ninety days before it would be marketable, and the company was then manufacturing cement at the rate of about 300 barrels per day, so that the company had resources wherefrom to realize money for the payment of such loan and the said \$27,000 of the company's bonds would in nowise have been in danger of being lost to the company by being hypothecated; that by these acts of De Goeijen,

Scott and Hawkes, in violation of their trust and duty, the company, in November 1899, was left wholly without means to carry on its business or to pay its debts, and a large amount of labor and other claims having accumulated against the company, payment whereof was imperatively required, the company was "in a critical and desperate" financial condition; that Kelly, to obtain cash, was obliged to and did sell the cement on hand in its green and unmarketable condition, but only procured sufficient means to pay labor claims and such debts as it was imminently necessary to pay in order to keep the works from being shut down; that Kelly, knowing the Fahrneys were only waiting to declare their bonds due and to foreclose, that De Goeijen was actively and affirmatively taking steps to prevent the company from obtaining means "to save its life," that the interest on the De Goeijen bonds due November 1 was due and unpaid and that upon three months' default the principal of those bonds would be declared due and that mortgage foreclosed, he, Kelly, within a few weeks of January 1, negotiated a lease of the company's property which lease was authorized by a majority of the stock represented at a legal meeting of the stockholders and was executed December 16, 1899; that the company's fixed charges were then about \$15,000 per year and the rental provided for in the lease was \$20,000 per year, in addition to certain benefits and improvements for the company's advantage, and the lessee also at once furnished the money to pay the Fahrney and De Goeijen past-due interest; that when the lease was made it had become a question between making the lease and the destruction of the company.

That when the Fahrneys and McDougal Hawkes discovered that provisions had been made for the payment of the interest on the company's bonds they "made special and definite arrangements" "to take such immediate action as would wreck the said White Cliffs Company for the benefit of the said Fahrneys and the said

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De Goeijen, against the interests of your orators"; that "pursuant to such unlawful conspiracy and plan" they procured the Guardian Trust Company to join them and "enter into said unlawful and fraudulent conspiracy with them for the purpose of bringing about the destruction" of the company; that in pursuance of this unlawful conspiracy two suits in chancery were begun against the company, the bills being drafted and filed at the same time; that one of the suits was by the Trust Company, in which De Goeijen was a large stockholder, brought in the United States Circuit Court for the Western District of Arkansas, to foreclose the De Goeijen mortgage, although the mortgage was not then due and no right existed to institute the proceeding, and the other suit was filed in the same court by William H. Fahrney, De Goeijen and others, as stockholders, to set aside the aforesaid lease; that upon allegations in both bills which were false and an imposition upon the court a receiver was appointed of the property of the company, at once and without notice to the company or anyone interested in preventing a receivership.

That a few days "thereafter", at the regular annual meeting of the company, a new board of directors was elected at the instance of De Goeijen and the Fahrneys, without reference to the interests of the company; that Ezra C. Fahrney was then elected a director again, Hawkes was elected president of the company, the Kellys were removed from their positions as secretary and treasurer, and the attorneys of the company, who had "attempted to procure the discharge of the said receiver, and tried to make a defense to their foreclosure proceedings", were dismissed; that the attorney for the receiver, who was attorney for De Goeijen and the Fahrneys "in their interests personally" in the litigation, was made attorney for the company; that the appointment of a receiver was entirely unnecessary and unjustifiable and was one of the steps taken by De Goeijen, the

Fahrneys and the Trust Company in furtherance of their fraudulent purpose to wreck the company "and obtain it for themselves", and the receiver continued in charge for more than eighteen months; that soon after the suits were begun De Goeijen and the Fahrneys, by the payment of a large sum of money and threats of destructive litigation against Lazarus, procured his consent and had a decree entered for a rescission of the lease.

That in the meantime, during the litigation, interest had again become due on the Fahrney bonds and the time had ensued when the Fahrneys were entitled to, and they did, declare the whole of the \$115,000 due and payable; that by arrangement between the Trust Company, De Goeijen and the Fahrneys and with the assistance of the aforesaid attorney for the receiver, a cross-bill was filed for the foreclosure of the Fahrney mortgage, a decree of foreclosure rendered ordering a sale of the property if the debt was not paid within thirty days, and on August 3, 1901, a sale was held and the property "bought in for and on behalf of the said De Goeijen and the said Fahrneys", whereby the complainants have been deprived of their holdings in the company and their stock has become worthless; that "from" the annual stockholders' meeting in February, 1900, E. C. Fahrney, De Goeijen's representatives and the Fahrneys have held various directors' and stockholders' meetings at which they have openly and uniformly declared the intention of destroying the company by foreclosure of their mortgages and the use of their majority of the stock and "have arranged and concocted a plan" for reorganization "by which they will divide" the company's property among themselves according to certain terms agreed upon; that John W. Read, formerly a stockholder and officer, acted with and assisted De Goeijen and the Fahrneys in their wrecking of the company, and that it would be useless and unavailing to make any demand upon the officers

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of the company, who are defendants, to bring this suit, and therefore complainants, as stockholders, have brought this suit.

Such, as appears above, are the allegations of the bill in substance. The Fahrneys by an answer and an amended answer denied the material allegations of the bill and set up, as showing a former adjudication, the pleadings of the Kellys and proceedings in a certain cause in the Federal Court in Arkansas. After a replication had been filed the cause was, on April 19, 1902, referred to a master in chancery, to take proof and report the same "with his opinion on the law and the evidence". On March 27, 1907, the master filed a report favorable to the complainants. Exceptions to this report were heard by the chancellor and he entered a decree dismissing the bill for want of equity. The decree contains findings of fact, but almost exclusively by reference to the master's report and the exceptions thereto, and the findings are not intelligible except by reference to papers outside of the decree, for instance: "The exception to finding 66 of the Master, so far as the same has relation to the Master's prophecy, is sustained. But as to the remainder of the Master's finding 66, it is ordered the exception thereto be overruled".

"The court finds that finding 93 of the Master's report is not a finding of fact, except * * * , in so far as it is a finding of fact the court cannot find but the Master may be right". The decree is in that respect peculiar and without precedent in its form, and we do not approve of the form. An appeal from the decree was prayed, allowed and subsequently perfected to this court.

CHURCH, McMURDY & SHERMAN and ERNEST DALE OWEN, for appellants.

VAIL & PAIN, JOHN E. SEINWERTH and HENRY C. NOYES, for appellees.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

That the officers and directors of a private corporation are in a fiduciary relation to the corporation and to the stockholders is elementary. Their duty, under the principles of equity, is to serve their trust beneficiaries honestly, faithfully and without negligence. They may not avail themselves of their position for their own gain, profit or advantage when to do so involves negligence of duty, loss of their service or other loss, injury, detriment or disadvantage to the beneficiaries of their trust. It is fundamental in the law of corporations that the majority of the stockholders shall control the policy of the corporation and regulate and govern the lawful exercise of its powers and conduct of its business. *Wheeler v. Pullman*, 143 Ill. 197, 207. But as between one stockholder and another there is also a fiduciary relation and a duty to act honestly and in good faith, so far as the exercise of their powers *within the corporation* is concerned. In the common enterprise they may not form combinations among themselves to crush the pecuniarily weaker by the force of overwhelming financial power. Through the community of interest a relation has arisen and exists, affording opportunities of wrongdoing that otherwise would not exist. A majority combination may protect its own financial interests, but it may not exercise its powers for its own sole benefit at the expense of the minority nor designedly so conduct the corporation's affairs as immediately or ultimately pecuniarily to benefit some stockholders at the unequal and, therefore, unfair and inequitable pecuniary loss on the part of others. Equity will not tolerate a majority combination in a joint financial undertaking to perpetrate a wrong and injustice upon the minority, where the combination is made possible merely by the nature of the relation. There is in such joint financial venture a limited fiduciary relation between the parties thereto.

Yet, while such are the duties and obligations of officers, directors and stockholders, there is no duty on their part to use individual pecuniary means to assist the corporation in its money difficulties or by use of such means to shield it from financial destruction.

The principles above referred to have been announced frequently and under various circumstances: See *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 334 *et seq.*; *Bixler v. Summerfield*, 195 Ill. 147, 150; *Hoffman v. Reichert*, 147 Ill. 274, 279; *Bruschke v. N. Chicago, etc.*, 145 Ill. 433, 445; *Green v. Hedenberg*, 159 Ill. 489, 493; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 606; *Adams v. Burke*, 201 Ill. 395; *Brown v. De Young*, 167 Ill. 549.

In *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. Rep. 625, 630, there was a controversy where a majority combination exercised its powers wholly according to the forms of the law, and yet a court of equity intervened to prevent injustice to the minority. Speaking of the majority, who were defendants, the court said:

“Plainly, the defendants have assumed to exercise a power belonging to the majority in order to secure personal profit for themselves without regard to the interests of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority.”

And at p. 631, the court quotes Justice Blackburn in *Taylor v. Chichester Ry. Co.*, L. R. 2 Exch., 356, as follows:

“As the shareholders are, in substance, partners in a trading corporation, the management of which is intrusted to the body corporate, a trust is, by implication, created in favor of the shareholders that the corporation will manage the corporate affairs, and

apply the corporate funds, for the purpose of carrying out the original speculation.”

And then continues:

“When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que trust*”.

We concur in these expressions as being equitable principles controlling stockholders in the exercise of their powers, as such, *within* the corporation.

In *Farmers' L. & T. Co. v. N. Y., etc. R. Co.*, 150 N. Y. 410, at page 430, the following quotation is held to be the law:

“The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders”.

Indeed, the foregoing legal propositions are not very seriously controverted by the defendants in the case at bar.

We are convinced that under the circumstances herein a demand that the corporation bring this suit would have been useless.

Counsel for appellants in their brief say “the findings of the master sustained by the court will be accepted by this court”, and they then proceed to as-

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sume such findings "as established facts of the case". The doctrine counsel seek to invoke, as to the conclusiveness of the master's findings when confirmed by the chancellor, is, in reality, the common law doctrine of *res adjudicata*, for there is no applicable statutory enactment. Counsel, in their brief, continuously refer us to these findings, in disregard of the abstract and the record. This plan of argument and presentation of the case has vastly increased the labor of this court. Conceiving, however, our duty in the administration of justice to be of a higher order than that of mere moderators between counsel for contesting parties, one or the other of whom may to a greater or less extent labor under a misapprehension as to practice or procedure, we have gone back of these findings into the abstract and, at times, into the record, in order to ascertain the facts. Counsel's duty is to aid and assist the court; but when there is a misapprehension by counsel, either in matters of procedure or in matters of substantive law, we do not consider that in order to save ourselves labor, we may remain indifferent whether the result in the cause be justice or injustice.

Masters, in the proper exercise of their function, are exceedingly helpful to the chancellor. Under the law we are not, however, permitted to give any adjudicative effectiveness to their conclusions or their reports. The chancellor has no right to do so. He cannot, to any extent, delegate to the master his (the chancellor's) duty to exercise and rely wholly upon his own judgment. The function of the master is to perform clerical and ministerial duties in the progress of a case. *Ennesser v. Hudek*, 169 Ill. 494; *Hards v. Burton*, 79 Ill. 504; *De Leuw v. Neely*, 71 Ill. 473.

The findings of a master on questions of fact must not be given the consideration and weight by a chancellor that the verdict of a jury is entitled to receive from the presiding judge in a common law case. *Larson v. Glos*, 235 Ill. 584.

A chancellor cannot, either upon his own motion or upon the request of a party, abdicate his function to determine, by his own judgment entirely, the controversy presented and devolve that duty upon one of his officers. Without consent of the parties it is not competent for the chancellor to refer the entire decision of a case to a master, for it is not within the general province of that officer to pass upon the issues in an equity case. *Kimberly v. Arms*, 129 U. S. 512; *Garinger v. Palmer*, 126 Fed. 906. The law does not even contemplate the preparation by the master of an opinion on the law in the case, and for a chancellor to allow a master to charge costs for writing such an opinion, stating his reasons and quoting authorities, is contrary to law. *Manowski v. Stephan*, 233 Ill. 409.

Appellants' counsel contend in their brief, in effect, for power of decision in the master which would be of adjudicative effectiveness, *i. e.*: for power of decision in him to such an extent that his findings, when confirmed by the chancellor, would be *res adjudicata* and conclusive. They say: when the chancellor's conclusions upon the facts are strengthened and reinforced by the master's findings, then those conclusions are conclusive on this court. They, however, in their reply brief, rather recede somewhat from this position. The law is that the master is not a judicial officer and hence he cannot, to any extent or in any degree, exercise power determinative upon the rights of the parties, *i. e.*: he may not exercise judicial power. Neither can the chancellor confer adjudicative power of decision upon him. *Cowan v. Kane*, 211 Ill. 572, 575; *Hards v. Burton*, 79 Ill. 504, 509; *Ennesser v. Hudek*, 169 Ill. 494; *De Leuw v. Neely*, 71 Ill. 473.

Indeed, the contention for power of decision in masters to any extent adjudicatory in its effectiveness is based upon a misconception of our judicial institutions and the source of judicial power. Adjudication, exertion of judicial power, is an exercise of the sover-

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eign power of the state—the governmental power. A determination arrived at in the exercise of judicial power, when rightfully exercised, is *res adjudicata*, i. e., conclusive. The doctrine of estoppel *in pais* is another doctrine of conclusiveness, but it rests upon other principles and is not applicable here. It has long since been held in this state that power of decision of adjudicatory effectiveness or conclusiveness comes only through the constitution from the people, and cannot otherwise be obtained, even by consent of the parties immediately concerned. The exercise of such power by a master or anyone not of the judicial branch of government is not permitted, and a law granting such power to any person or body other than as designated in the constitution is unconstitutional. *Hall v. Marks*, 34 Ill. 358; *Hoagland v. Creed*, 81 Ill. 506; *People v. Chase*, 165 Ill. 527; *Hards v. Burton*, 79 Ill. 504; *People v. Altgeld*, 43 App. 460.

The exercise of the judicial power consists in ascertaining the facts, in determining what the law is, and what law. i. e., legal principle or statutory enactment, is applicable to the particular facts, and in then applying the law to the facts. The conclusions upon the law and the facts and the application of the law to the facts by the master can in no degree be regarded as of adjudicatory or conclusive effectiveness until fully examined and passed upon by the chancellor, and then the conclusions if approved become the conclusions of the chancellor and his decree may be reviewed according to law.

We come, then, to the facts. We find that the evidence neither sustains the allegations of the bill charging or suggesting fraud nor does it show that either Peter, Ezra C. or William H. Fahrney in any wise committed any fraud upon the complainants or either of them. The evidence proves no breach or violation of any fiduciary duty or obligation arising out of the relations that existed.

The evidence shows: That in 1892, William and

John Kelly discovered a deposit of chalk and, adjoining it, a clay deposit, on Little River, in a part of Arkansas which some witness characterizes as a "howling wilderness". The chalk deposit was not unusual in Arkansas and Texas but complainants claimed for their discovery a superiority in quality, which superiority is disputed. By several purchases and options the Kellys secured about 3,000 acres of land at a cost of about \$40,000. In extent the chalk deposit was about 900 acres and the clay deposit about 600 acres. December 16, 1893, the Kellys and one Metesser organized the White Cliffs Portland Cement and Chalk Company, with capital stock as stated heretofore. William Kelly subscribed for all the stock except four shares, and of these four John subscribed for two and Metesser for two. Metesser was elected president, William Kelly secretary and John Kelly treasurer. The stock was divided into 8,000 shares of preferred stock, which remained in the treasury of the company, and 32,000 shares of common which went to the Kellys and Metesser. The preferred was subsequently converted into common so that all the stock was placed on a level. The land went to the company for the 32,000 shares of stock. Whether the land was all paid for by Kelly is not made clear and does not seem to be material, for it has been all paid for at some time. William J. Kelly testifies that he had spent \$15,000 in preliminary work. At the annual meeting, on February 4, 1895, David B. Coulter, from whom considerable of the land had been bought and who had not been fully paid when the Fahrneys were first approached, was substituted for Metesser as director.

In the fall of 1895 William J. Kelly came to Chicago with a prospectus, reports of analyses by chemists, samples of chalk, plans for the erection of a plant for the manufacture of cement from the chalk and clay, a statement of the company's offer for the sale of a bond issue of \$125,000 at eighty cents on the

dollar with an amount of stock, as a bonus, equal to the amount of bonds taken, etc. The proposed plant was estimated to cost fifty to sixty thousand dollars so that about forty thousand dollars would be left for working capital. It was stated in the statement that the works would have a capacity of 500 barrels per day. One John W. Read, with whom Kelly had a previous acquaintance, was a bookkeeper with the Dr. Peter Fahrney Sons Company. Read interested himself in Kelly's matter and introduced Kelly to Ezra C. Fahrney and some of his friends and associates; of the latter A. O. Cooper and John E. Scully became interested. Kelly had a subscription list to be signed by subscribers for the bond issue and he obtained some subscriptions of \$5,000 each, among them being E. C. Fahrney's subscription for that amount; but these subscriptions were all dropped. Early in December, 1895, Kelly, Ezra C. Fahrney, Cooper and Scully went to White Cliffs and looked over the ground. The nearest post-office to White Cliffs was Johnston, five or six miles away, where there were a small general store and two or three huts. While in Arkansas they stopped at the house of David B. Coulter, who is now one of the complainants. Meetings of the directors and stockholders were held in Texarkana on December 16, 1895, and a bond issue of \$125,000 was there authorized, to be secured by a trust deed on all the company's property. Accordingly bonds were issued of \$1,000 each, dated December 31, 1895, and bearing interest at 6% per annum, payable half-yearly on the first days of January and of July in each year, and a trust deed to the Title Guarantee and Trust Company of Chicago, to secure those bonds, was executed and recorded. The trust deed contained a provision that, if default in interest continued for six months after demand, the principal should become due and payable.

Upon the return of the Fahrney party to Chicago E. C. Fahrney took \$25,000 of the company's bonds,

which were paid for by Peter Fahrney's check dated December 27, 1895, to the order of Ezra C. and by the latter indorsed to the company. This check was paid through the Chicago Clearing House on January 3, 1896. About the same time Kelly succeeded in obtaining for the company \$25,000 more from North & Taylor by the sale of \$5,000 and the hypothecation of \$50,000 of the bonds to them. North & Taylor was a private banking firm which shortly thereafter failed and all its bonds came to the Fahrneys later. As part of the bargain for the sale of the \$25,000 of bonds to Ezra C. Fahrney he was given the \$200,000 of treasury stock, some of which he distributed among his friends. Kelly, of his stock, gave to John W. Read \$50,000 and to Ernest Dale Owen, his lawyer, \$25,000. A stockholders' meeting was held in Chicago on December 30, 1895, at which the board of directors of the company was increased from three to five, and to make up the number Ezra C. Fahrney and John W. Read were elected directors. According to the by-laws the company's annual meetings were held on the first Monday in February each year. February 3, 1896, William J. Kelly was elected president, E. C. Fahrney vice-president, John Kelly secretary and treasurer, and John W. Read assistant secretary and treasurer.

About April 7, 1896, Kelly, as president of the company, arranged with Peter and Ezra C. Fahrney to take the remaining bonds, amounting to \$45,000. Stock of an equal amount went with these bonds and by August 11, 1896, these had all been paid for by checks issued from time to time. Another \$25,000 of the bonds was turned over to E. C. Fahrney in August, 1896, to secure him for an advance of \$20,000 on August 20, 1896. The company's note, payable in one year, was given him to evidence this advance. This \$25,000 of bonds was part of the \$50,000 deposited with North & Taylor as collateral.

By means of negotiations between William J. Kelly

and E. C. Fahrney, during November and December, 1896, as his checks show, Peter Fahrney purchased \$25,000 more of the bonds of the company. These were the last bonds of the company that the Fahrneys obtained and the bond holdings of the Fahrneys thus amounted to \$120,000 out of the \$125,000 issue. There were some transactions between Kelly or the company and the Fahrneys respecting smaller amounts, but they are not material. In connection with this last \$25,000 of bonds complainants make what they evidently regard as one of the most serious of their charges of breach of fiduciary duty and obligation against the Fahrneys. Kelly has even brought a personal suit in connection therewith, wherein he has been defeated. Kelly testifies that the arrangement for the sale of this \$25,000 of bonds was made with Ezra C. Fahrney and that, as part of the transaction, Fahrney was given \$25,000 of stock by him, Kelly, personally, and he, Fahrney, promised to make the company a loan of \$75,000 for ten years on its unsecured note for that period, and that subsequently, when it came to the point of making that loan, Fahrney refused to make it. Kelly states that Fahrney told him he could not procure the money from his father except upon conditions he did not think Kelly would accept. Fahrney denies making any such promise. Kelly also says that, upon Fahrney's assurance, "we naturally built a very much larger plant than we would have done if we had figured on a small amount of money", and that Fahrney participated in the plans for a larger plant. We believe that on account of his hopeful and sanguine, if not visionary, temperament, Kelly possibly exaggerated some casual remarks by Fahrney, to the effect that he would endeavor to raise that amount, or see that it was raised, for the company, into a promise to loan it. Kelly's several statements of what Ezra C. Fahrney said on the subject and not consistent. Considering all the circumstances we do not believe any promise was made to make any such loan.

It does not even appear that Ezra C. Fahrney was at that time personally able to make any such loan or that Kelly had any information upon which he supposed or whereupon he was justified in supposing that Ezra C. Fahrney had the ability to make a loan of that amount. At all events, taking either Kelly's or Fahrney's view, there is nothing in this incident upon which fraud or breach of any trust duty or obligation can be predicated, be the incident considered alone or in connection with other facts in the case. Furthermore, there is no evidence tending to show that Peter Fahrney or William H. Fahrney authorized such promise by Ezra C. Fahrney or was in anywise connected therewith. Were there a breach of fiduciary duty, we could not assume or presume fraudulent participation on their part. Kelly places the occurrences in connection with this promise and refusal to carry it out in December, 1896, and January, February and March, 1897. The charge in the bill of complaint that the Fahrneys, in respect to the making of this promise and the refusal to carry it out, were actuated by the motive or purpose of securing the property of the company for themselves is not sustained by the evidence.

At the regular annual meeting of the stockholders of the company, held at White Cliffs, Arkansas, February 1, 1897, William J. Kelly, Ezra C. Fahrney, W. H. Fahrney, David B. Coulter and John Kelly were elected directors. The Fahrneys with some of their friends were then present. Shortly before there had been a public exhibition of starting the machinery and starting the company for business; but this starting was only a pretense, for the company's plant was in an unfinished condition and required more money for its completion before cement could be manufactured. At this time the company was in financial distress and apparently continued so until its activity terminated by the foreclosure of its property on August 3, 1901. The Fahrneys wisely, as the evidence shows

and as they certainly rightfully might, refused to put any more money into the company.

In April or May of 1897, Kelly while endeavoring to raise money for the necessities of the company when Fahrney refused to provide money therefor, told Fahrney: "I have got to have this money and you had better put this money in. You have got big interests here at stake; if you don't, I will get somebody else". After that Kelly (without the Fahrneys knowing whom he was negotiating with) procured William Edenborn, president of the American Steel and Wire Company, to furnish money for the company. Kelly endeavored to get \$75,000 from Edenborn, but he would only loan \$50,000. The loan was made by Edenborn upon a note and second mortgage dated May 21, 1897, running for one year. As part of the terms for making the loan Edenborn required \$300,000 of the company's stock absolutely and \$300,000 as collateral security, and that he should be president of the company. E. C. Fahrney had previously loaned Kelly \$2,000 upon a judgment note and advanced the company \$5,500 for machinery upon its note. On May 19, 1897, learning of the negotiations with Edenborn, Fahrney put his \$2,000 note into judgment. He also insisted that the \$5,500 note should be included in the Edenborn mortgage, which was acceded to. A directors' meeting was held on May 21, 1897, at which Coulter resigned and Edenborn was put in his place. Edenborn was elected president, William J. Kelly was made secretary and John Kelly remained treasurer. The Edenborn mortgage was then authorized.

The evidence in the record does not sustain the allegation of the bill that the Fahrneys approached Edenborn with a proposition that he join them in a conspiracy to wreck the company so they might obtain all the property of the company for themselves.

The money obtained from Edenborn was used to pay past interest due on the Fahrney bonds and in

discharge of other indebtedness of the company; and \$18,000 or \$19,000 remaining was expended in improvements or enlargement of the plant. But this additional money did not place the company upon a dividend-paying basis and it continued in financial distress. The interest days came around with regularity.

The vague charges in the bill of fiduciary misconduct on the part of the Fahrneys in connection with one Bartol are unfounded. It is true, however, as charged, that in 1897 the financial condition of the company was desperate. Edenborn became anxious to get his money back and to get out of the company.

In the early part of 1898 the company concluded to make an issue of \$250,000, of what was called "consolidated bonds". Kelly testified that at this period he and his friends "had control of the Board of Directors". Mr. Kelly negotiated with one DeGoeijen, a Hollander, and induced him to take \$108,000 of these bonds. As part of this transaction, consummated July 25, 1898, De Goeijen required and obtained from Mr. Kelly a bonus of \$502,500 of the company's stock. Of the remainder of this consolidated bond issue sufficient was reserved—about \$115,000—to take up the Fahrney bonds when due, and \$27,000 was put up in trust with the Guardian Trust Company of Kansas City under some arrangement between Kelly and De Goeijen. It was also a condition of the arrangement with De Goeijen that the "Kellys were to have and retain the active management" of the company's business.

The stockholders' meeting of 1898 was, for want of a quorum, not held in February, but was held April 30 of that year, at White Cliffs. The consolidated bonds and form of mortgage were at that meeting approved. The board of directors was then changed from five to seven and Edenborn, E. C. Fahrney, William J. Kelly, John Kelly, C. P. Murray, Edgar Drain and Coulter were elected directors. Edenborn, Fahr

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ney and William J. Kelly continued in their respective offices of president, vice-president, secretary and treasurer.

The charge in the bill against E. C. Fahrney that he, on December 26, 1897, had agreed with Kelly to give him \$110,000 of the Fahrney stock if he, Kelly, succeeded in obtaining \$100,000 for the company on the consolidated bonds, is denied by Fahrney and is an absolutely immaterial matter, except that it explains Kelly's conduct in instituting certain lawsuits against Fahrney in Arkansas. Through connivance between William J. Kelly, Owen, Coulter and Jones, who was the company's local attorney, an attachment suit was brought in Arkansas by Coulter, upon a note he held against Kelly for \$10,000. Substantially all the Fahrney stock in the company was then levied upon in order, as substantially conceded, to get it into hands friendly to the Kellys. The ground for levying on the Fahrney stock for Kelly's debt was that when Kelly transferred the stock to the Fahrneys there had been a failure to comply with some registering requirement of the Arkansas statute. Kelly had stock which was not levied upon.

This Coulter attachment of the Fahrney stock was not a fraud. But a court of equity, guided by conscience, does not regard the taking of one person's property to pay another's debt, or an effort to coerce one person to pay the debt of another, as commendable. If Coulter had included in his levy all the Kelly stock, he would have occupied a better position before a court of equity. As it is, he was evidently combining with Kelly against the Fahrneys rather than merely attempting to collect a debt justly due him.

At this time E. C. Fahrney was in Arkansas to attend the directors' meeting held April 30, 1898, and immediately after the meeting he was served with process in the attachment suit and in three suits then instituted by Kelly. One was a suit for damages for not making the \$75,000 loan, another was an action

at law to recover damages for refusal to deliver the \$110,000 of the company's stock to Kelly, and the third was a bill to compel specific performance of the agreement to deliver to Kelly the \$110,000 of stock. Thereafter the relations between the Fahrneys and the Kellys were not friendly. All the E. C. Fahrney stock was sold in the Coulter attachment suit and litigation in respect thereto followed. Fahrney returned to Chicago early in May and Ernest Dale Owen took occasion to call upon him. Owen then informed Fahrney that his stock had been attached, that for some technical legal reason the Fahrney bonds were worthless, and said: "They (the Kellys) have got you tied up in such a manner you can't move a hand. The best thing you can do is to settle and settle at once." Apparently what was desired of the Fahrneys was that they should give up their stock to the Kellys. A letter written by Kelly to John W. Read, dated August 4, 1898, also indicates this. E. C. Fahrney attended no meeting of the company after April 30, 1898, until February 5, 1900. Kelly, by extremely unwise conduct, detrimental to the welfare of the company, had compelled the Fahrneys to believe that their interests as bondholders were at stake, and that they must fight for their rights as bondholders—and this while he was in control. The Fahrneys, after this, took no part in the management of the corporation during a long interval of time, perhaps a year and a half or more. The arrangement with De Goeijen was made by Kelly and he and De Goeijen thereafter controlled the majority of the stock. For a long time after De Goeijen became interested the Fahrneys knew nothing of him or his interest in the company. Nor did they have any communication with him or come in contact with him until December 26, 1899. On that date McDougal Hawkes, who represented De Goeijen, telegraphed the Fahrneys from New York, asking for a meeting in Chicago.

In the meantime there had been some change in the

directorship by Owen, Scott, Vaughan and Hawkes having been elected in the places of Coulter, Drain, Murray and Edenborn. John Scott had also become president in place of Edenborn. These changes were made by the Kellys and the De Goeijen interests. Out of the \$108,000, Edenborn had been paid but the Fahrney's \$5,500 note was not paid. The remainder of the \$108,000 had been expended under the Kelly regime, and Kelly was short of money again. He endeavored to raise \$12,000 by hypothecation of the \$27,000 of bonds placed with the Guardian Trust Company, but was prevented by DeGoeijen. The Fahrneys had no connection with his being so prevented, and it does not appear that they even knew of the fact. True it is, as alleged in the bill, that during this interval when the Fahrneys took no part, the affairs of the company got into "a critical and desperate" financial condition, but this was under Kelly's management and in nowise was it brought about by the breach of any trust, duty or obligation on the part of any of the Fahrneys.

The Kelly-Fahrney litigation continued during the latter part of 1898, during 1899, and even thereafter. Kelly, it seems, ultimately failed in his suits. Foreclosure proceedings were instituted July 13, 1897, by W. H. Fahrney in a state court in Arkansas upon the Fahrney \$5,500 note, secured by the same mortgage which secured the Edenborn \$50,000 note. This suit was prosecuted for some time, and in January 1900 was transferred to the United States Circuit Court and consolidated with the De Goeijen foreclosure suit, to which we shall refer presently. In the Coulter attachment suit, no defense was made and the Fahrney stock levied upon was sold at a sheriff's sale August 28, 1898. Mr. Coulter bought it in. Upon a bill filed by Fahrney in the United States Circuit Court this sale of the stock was set aside on May 21, 1900, and a re-sale ordered. A re-sale was made by the sheriff on August 11, 1900, and at this sale Coulter

again bought in the stock. With reference to these sales of the Fahrney stock the appellants insist that, "The sale having been made to Coulter in August, 1898, confirmed by the state court in that month, the title to this stock in Coulter was complete and effectual from that day." We are inclined to agree with that contention. And if the contention is correct the stockholder relation between the Fahrneys and the other stockholders as well as between the Fahrneys and the corporation itself, then terminated. If that be so, then the fiduciary relation arising out of the holding of stock with its duties and obligations toward other stockholders terminated on August 28, 1898. We have already seen that there was no breach of any such duty or obligation before that point of time. At all events the relation terminated by the re-sale of the stock and purchase thereof by Coulter on August 11, 1900.

But whatever the date of severance of the relation of the Fahrneys to the company as stockholders, by the act of complainant Coulter, we do not find that the evidence in this record justifies a decree against the Fahrneys for breach of any duty or obligation arising from their relation as stockholders or officers of the company. It must at all times be borne in mind that the Fahrneys had a first lien upon the company's property for a sum of about \$115,000 cash put into the company. As holders of this first lien they had certain paramount rights which all the stockholders and officers were, at the time the money was advanced, very willing to acknowledge and which they have ever since been in duty bound to acknowledge and concede, both at law and according to the principles of equity. No effort by the Fahrneys with a view merely to collect the money due them from the company, by means or according to methods provided by law, can be regarded as a breach of any fiduciary relation.

During the interval that the Fahrneys were not actively participating in the management of the com-

pany's affairs, De Goeijen evidently became desirous of withdrawing. In September 1899 he gave Kelly an option on the DeGoeijen interests at principal and five per centum per annum interest. If the Kellys were unable to avail themselves of the option by January 6, 1900, they were to withdraw from the management of the property.

During this interval Kelly also brought about a leasing of the entire plant and property of the company. The Kellys with their adherents, held stockholders' and directors' meetings on December 9 and 16, 1899, at which neither the De Goeijen nor the Fahrney interests were present. There is some contention as to the notices for these meetings, but certainly Scott, the president, was notified, yet he was not present. At these meetings Coulter voted the Fahrney stock which he had purchased at the sheriff's sale. But in view of subsequent events precisely what took place at these meetings is not now very material. However, a lease of all the company's property to the Arkansas Portland Cement Company was considered and authorized. The lease bears date December 16, 1899, and the lessee company was organized on that date with a paid in capital of \$40,000 to take that lease. On the part of the White Cliffs Company it is executed by W. J. Kelly, president, and attested by John Kelly. The term of the lease is five years from December 16, 1897, with a renewal option for five years more. The rental specified is \$20,000 per year. There is a controversy as to the amount of the company's fixed charges per annum. The complainants claim \$15,000 per year and the defendants considerable more. There was no provision made for the pending \$5,500 foreclosure.

It is more than probable that Hawkes, who represented De Goeijen, heard of the making of this lease immediately, and that such information induced him to send the telegram of December 26, 1899, already spoken of, and the De Goeijen and the Fahrney inter-

ests were brought in touch with each other. Previously there had been no concert of action between them, but from this time on they acted in conjunction, until the Fahrneys received back the money they had loaned the company.

Acting in concert they filed two bills in equity in the Federal court in Kansas. One of these bills, entitled Cooper v. White Cliffs Company, was to set aside the above mentioned lease made by the company to the Arkansas Portland Cement Company as fraudulent. The other bill nominally entitled Guardian Trust Company v. White Cliffs, etc., Company, was filed on behalf of the De Goeijen interests, to foreclose the mortgage securing the consolidated bonds of which De Goeijen held \$108,000. These bills were filed January 6, 1900. The lease controversy, so far as it concerned the Arkansas Portland Cement Company, was settled with that company by the De Goeijen and the Fahrney interests and the Cooper bill was dismissed in a very short time. It appears from the evidence that in the settlement the Arkansas Cement Company was repaid a few thousand dollars that it had laid out or expended for the White Cliffs Company. In the foreclosure suit there was a sharp controversy.

W. J. Kelly and Ernest Dale Owen, complainants, testify herein that Mr. Owen and his local associates, Jones & Hudgins, were not permitted to make a defense for the White Cliffs Company in this foreclosure suit. The record thereof is against them. So far as the present suit is concerned, it is only necessary to ascertain whether fraud in the making of the above mentioned lease and the right to bring the suit for foreclosure at the time it was brought, were in issue. It appears from the record that on February 3, 1900, an answer to this foreclosure bill on behalf of the White Cliffs Company was filed by Jones & Hudgins and Ernest Dale Owen as its solicitors. This answer was sworn to by W. J. Kelly. Allegations appear in the

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bill charging fraud in the making of the lease. In this answer the validity of the lease is asserted, the allegations of its fraudulent nature denied and assertions made tending to show its *bona fides* and the absence of all fraud in connection therewith. The answer also denies that there was any interest due upon the \$108,000 of bonds which alone could authorize the filing of the bill. Ernest Dale Owen in his testimony herein admits that he was permitted to appear in the suit and make arguments and that he filed a brief therein. A decree of foreclosure was rendered May 17, 1901, and therein it appears that it was rendered upon argument of counsel including "Paul Jones and E. D. Owen representing the defendants." The decree provides for the payment of costs including "the allowance heretofore made to Messrs. Jones and Owen by the court as counsel for the defendant", which counsel fee, it appears, was \$2,000. In view of these facts no amount of assertions by Mr. Owen and Mr. Kelly of the discharge of Jones and Owen as attorneys for the company would establish as a fact that Jones and Owen did not appear and make a defense for the company upon these questions of validity of the lease and the existence of a right to foreclose. Furthermore, Mr. Owen does not particularize and specify as to what he did in court at all the various times he attended in the matter of the foreclosure after his discharge as attorney for the company. He seeks to evade inquiry into that subject by stating his conclusion that he was refused a hearing. Evidently there was a real litigation, a real defense and a real contest upon the two defenses above referred to. The decree entered May 17, 1901, held the lease fraudulent in law and invalid and interest on the De Goeijen bonds past due when the bill was filed. It is a well-established principle of law that counsel, as well as the parties, are conclusively bound by the decree of the court. In *Guardian Trust Company v. White Cliffs Portland Cement & Chalk Company et al.*, 109 Fed. Rep. 523,

appear the grounds upon which the lease was set aside and the right to file the bill was held to exist. We do not, however, regard that case or opinion as being in evidence herein.

As between the complainants herein and the Fahrneys the lease must be regarded as fraudulent and conclusively so. Therefore, all the concert of action between the Fahrneys and the De Goeijens with a view to having it set aside was perfectly proper and lawful; although such concert of action may appear as a combination against the complainants and may, to them, appear as against the interests of the company.

It is perfectly apparent why the Fahrneys acted in concert with the De Goeijens. The Fahrneys had prior and superior liens and they wanted their money back and not the property.

At first, January 2, 1900, a reorganization scheme was considered and a reorganization agreement made. The evidence shows that this scheme and agreement were not acted upon. Dr. Peter Fahrney would not have been very wise if he had entered into that scheme. He had the prior liens and he wanted his money, why should he join in reorganization? At all events he did not. To the extent of bringing about a foreclosure sale of the property so that he would get his money through the De Goeijen interest, he did join with the De Goeijen interests. For that purpose he had an equitable and lawful right to do so. To obtain for the Fahrneys any more, or any interest in the property after the sale, they would have had no equitable or legal right to join with De Goeijen. The complainants have absolutely and totally failed to connect the Fahrneys, who are the only defendants before the court, with the property of the company after the sale. The evidence is convincing to the contrary. Complainants are shooting far wide of the mark when they argue: "What we complain of is not as to who got the property, or what became of it, but that we are deprived of it and the value of our stock destroyed."

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February 5, 1901, a bill of foreclosure was filed on behalf of the Fahrneys to foreclose on their bonds. That bill is entitled Title Guarantee & Trust Company v. White Cliffs Company. The suit was consolidated with the Guardian Trust Company's bill foreclosing the De Goeijen bonds. Under the decree entered in the consolidated suit on May 17, 1901, the property of the company was sold on August 3, 1901. At that sale the Fahrneys bid \$150,000, supposedly sufficient to cover their liens. A representative of the De Goeijens bid \$160,000 and the property was struck off to him. On August 20, 1901, the sale was confirmed by the court. The Fahrneys obtained a return of the money they had loaned the company. Under the law of Arkansas it appears there is no period of redemption.

We find in this record no evidence of breach of fiduciary duty or obligation on the part of the Fahrneys. The facts in this case required a decree of dismissal for want of equity.

The decree of the chancellor is affirmed.

Affirmed.

John Heidelmeler, Appellee, v. Helena Hecht, Appellant.

Gen. No. 14,195.

1. PRACTICE—*proof required in assumpsit against joint debtors in absence of plea denying joint liability.* Notwithstanding no plea denying joint liability is interposed in an action of assumpsit, yet there can be no recovery by the plaintiff unless the evidence shows the joint liability of all the defendants to the action.

2. ASSUMPSIT—*when joint liability does not appear.* Held, that the evidence in this case did not show joint liability by the several defendants joined in the action.

BAKER, J., dissenting.

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Assumpsit. Appeal from the Municipal Court of Chicago; the Hon. JOHN H. HUMM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed and remanded. Opinion filed December 4, 1908.

A. G. DIOUS, for appellant.

TODD & MORRISON, for appellee.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

Heidelmeier, appellee, brought this action of assumpsit in the Municipal Court against Sigmund Hecht and Helena Hecht, husband and wife. The action is for services rendered by Heidelmeier in procuring a purchaser for certain real estate. The common counts and a joint plea of general issue constitute the pleadings. The case was heard by the court without a jury. The issues were found for the plaintiff and a judgment rendered against both defendants for \$1,435.28. From that judgment Mrs. Helena Hecht prosecutes this appeal.

Heidelmeier, an art glass manufacturer, testified that he had known the Hechts for fifteen or eighteen years and had done all the glass work on the premises in question. About a year after that work was done Hecht by telephone requested Heidelmeier to call at Hecht's office. When Heidelmeier called there Hecht said he had heard Heidelmeier knew someone who desired to buy the property in question, adding: "You know that is the property where you furnished all the glass work for me—on my building on Evanston avenue." Heidelmeier, among other things, then replied: "Mr Hecht, I am not in the real estate business; I am in the glass business; I would like to get that in writing; in black and white that you will give me \$1,500 if I sell the building, and I will try and sell it". An agreement in writing was then made which in so far as material is as follows:

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"CHICAGO, Feb. 4, 1907.

MR. JOHN HEIDELMEIER:

Dear Sir:—

If you will sell or close a trade for building * * *,
I will pay you fifteen hundred dollars commission
(\$1500) as soon as said sale or trade is completed by
you.

Yours truly,

SIGMUND HECHT".

Through the procurement of Heidelmeier a trade
or exchange was made.

It appears that Mrs. Hecht owned the property and
that Mr. Hecht attended to the renting thereof. So
far as we can see from the record there was no com-
munication between Heidelmeier and Mrs. Hecht in
respect to this matter. The contract of exchange
made was signed "Helena Hecht by Sigmund Hecht,
Sigmund Hecht", and in pursuance thereof a deed was
subsequently executed by Mr. and Mrs. Hecht.

This action of assumpsit against Sigmund Hecht
and Helena Hecht, jointly, is predicated upon that
writing, the performance by Heidelmeier, the fact of
ownership of the property by Helena Hecht and the
making and carrying out of the contract as stated. In
such an action as this the law is the same whether two
persons made joint defendants be husband and wife
or not, so far as the necessity for proving a joint lia-
bility is concerned. By the mere joining of a person
as a party defendant a plaintiff cannot create a lia-
bility which does not otherwise exist. Express as-
sumpsit is an undertaking made orally, by writing not
under seal, or by matter of record, to perform an act
or to pay a sum of money to another. There is here
no pretense of an express joint promise by Mrs. Hecht.
Implied assumpsit is an undertaking presumed in law
to have been made by a party from his conduct,
although he has not made any express promise. Such
an undertaking is never implied where the party has
made an express promise. Here Sigmund Hecht has

made an express promise. Furthermore, his express promise is inconsistent with the theory of a joint obligation. The law sometimes presumes promises for parties where their acts and conduct justify the presumption, but it never creates promises for parties in square conflict with their acts or conduct. We find no evidence in the record of a joint undertaking on the part of Sigmund Hecht and Helena Hecht. If any question of an undisclosed principal exists in this case we do not wish to be understood as expressing any opinion thereupon.

No plea in abatement was filed, nor did Helena Hecht file any plea in bar denying joint liability. Hence it is contended she cannot be heard to deny joint liability and reliance is placed upon section 35 of the Practice Act to sustain this contention. That section provides that in actions against two or more defendants as partners, joint obligors or payors, proof of joint liability shall not *in the first instance* be required. Were the question an open one we could not take away the effect of the incorporation of those words "in the first instance" in the statute and read it as if those words were not there. Those words are words of restriction and limitation upon what would be the effect of the statute if those words were not there.

But the question is not an open one. In *Imperial Hotel Company v. Clafin Company*, 175 Ill. 119, the Hotel Company and A. C. Mills & Co., corporations, were sued jointly. They were held jointly liable by the trial court and the judgment was affirmed in the Appellate Court. The Supreme Court said: "The ground of reversal urged in the Appellate Court was, that the Superior Court erred in holding that the plaintiffs in error were joint debtors and jointly liable • • • . In the trial court there was no plea denying the joint liability, but it was insisted the evidence showed there was no joint liability". And, later, in holding that the judgment could not be sustained, the

court said: "No liability existed in favor of the H. B. Claffin Company against both these defendants as joint debtors. In an action *ex contractu* against several it must appear that their contract was joint, and that fact must be averred by the pleadings and shown by the proof on the trial, otherwise no recovery can be had; and this is the rule where the evidence shows the contract is several, although none of the parties have put their joint liability in issue by a plea in abatement or a plea in bar verified by an affidavit". To the same effect and fully as strong we find *United Workmen v. Zuhlke*, 129 Ill. 298, 303, and *Powell v. Finn*, 198 Ill. 567. In the latter case it is said: "It is also well settled that, even in the absence of a plea denying joint liability, the evidence must show such liability as to all of the defendants in order to entitle the plaintiff to a judgment".

This court has repeatedly laid down the same rule. *Davison v. Hill*, 1 Ill. App. 70, is in point. Therein the court, after stating that it was there claimed that by this section of the Practice Act the common law rule which, in actions *ex contractu* requires the cause of action to be established against all the defendants or there can be no recovery against any, had been changed, said: "We think the statute sufficiently radical in its innovations upon well established principles, without according to it so broad a scope as that". Speaking approvingly of this case last cited this court in *Martin v. Trainer*, 125 Ill. App. 474, said: "In the case of *Davison v. Hill*, 1 Ill. App. 70, it was held that section 36, now under discussion, did not require the filing of a plea denying joint liability, verified, when it affirmatively appears that parties are made defendants against whom no joint cause of action is shown". *Martin v. Nelson*, 53 Ill. App. 517, is precisely in point to the same effect. It is there held that notwithstanding this provision of the statute if it affirmatively appears from the plaintiff's evidence or is made to appear by the defendant's evidence, that

there is no joint liability, the joint action is then defeated. There are several other decisions to the same effect. Whatever language this court may have used in *Touhy v. Daly*, 27 Ill. App. 459, indicating that the section of the statute now under consideration has laid upon a joint defendant the burden of proving no joint liability, which is a negative, when no plea in abatement or verified plea in bar denying joint liability has been filed, must be regarded as overruled. The later decisions of our Supreme Court as well as of this court must be followed.

For the error indicated the judgment of the Municipal Court is reversed and the cause is remanded.

Reversed and remanded.

Mr. Justice BAKER dissenting.

The People of the State of Illinois, Defendant in Error, v. E. A. Wirsching, Plaintiff in Error.

Gen. No. 14,210.

1. **BUCKET SHOPS**—*what evidence competent in prosecution for keeping.* It is competent to permit a witness to state that the place in question in the prosecution was a "bucket shop."

2. **BUCKET SHOPS**—*when refusal of instruction not erroneous.* Held, in this case, that it was not error to refuse an instruction to the effect that proof that the defendant had conducted a bucket shop elsewhere than at the building named in the indictment would not "authorize or justify a conviction."

3. **BUCKET SHOPS**—*what not essential to conviction for keeping.* In order to sustain a conviction for the keeping of a bucket shop wherein is conducted or permitted "the pretended buying or selling of the shares of stock or bonds of any corporation" etc.. It is not necessary to show that the transactions of "pretended" buying and selling be of the shares of an existing corporation.

4. **INSTRUCTIONS**—*when not error to refuse.* When a jury has been instructed in respect to a particular proposition either in affirmative or negative form that is sufficient and it is not error to refuse another instruction upon the same proposition in the converse form.

5. **INSTRUCTIONS**—*when not error to refuse, upon credibility of*

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witnesses. An instruction upon this subject though stereotyped in form and correct in principle may be refused without the commission of error if it had not been so drafted as to fit the facts of the particular case and as presented has but slight applicability to the cause.

Criminal prosecution for keeping bucket shop. Error to the Criminal Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court October term, 1907. Affirmed. Opinion filed December 4, 1908.

EDWARD H. MORRIS, for plaintiff in error.

JOHN J. HEALY, for defendants in error; EDWARD S. DAY, of counsel.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

Wirsching, plaintiff in error, was indicted for keeping a bucket shop at 196 LaSalle street, in Chicago. The indictment contains two counts. One count designates his place as a bucket shop and the other as "a certain office" in the building described. In both counts it is alleged that in the place he kept there was conducted and permitted the pretended buying and selling of shares of stock of certain corporations, produce, etc., on margins and otherwise, without any intention of actually receiving or delivering the property dealt in or of paying therefor. He entered a plea of not guilty, was tried by a jury and convicted. A motion for a new trial was overruled and a fine of \$300 imposed in the entry of judgment upon the verdict. Wirsching sued out this writ of error, and the questions now arise: Did Wirsching keep a place at 196 LaSalle street in Chicago wherein was conducted or permitted such pretended buying or selling, and was there any error in the trial in the Criminal Court?

The statute under which the indictment was returned provides, among other things, that any one who shall communicate, receive, exhibit or display, in any manner, any such offer to so buy or sell, or any

statements or quotations of prices, with a view to any such transaction, shall be deemed an accessory and punished as principal.

It appears from the evidence that on May 4, 1906, at 196 LaSalle street in Chicago, there was a large room divided by a partition into a small room, which was a private office, and a larger room which was a customers' room. In the customers' room there was a blackboard, upon which were marked or posted quotations of various stocks. In the private office there were a number of clerks and the records, introduced in evidence, of the transactions made were kept there. There was a stock-ticker in the customers' room and in the private office there was a telegraph instrument. The money of customers was taken in in the private office. The instrument had direct connection with New York but the ticker did not, and therefore the quotations came in slower on the ticker than on the instrument and were from two to five minutes later. The witness John H. Doyle, who was a telegraph operator, watched the quotations at the time in question. The witness Woolridge testified that the place was a "bucket shop". We find the dictionary defines a bucket shop to be "an establishment conducted universally for the transaction of a stock exchange business, or a business of a similar character, but really for the registration of bets or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stocks or commodities nominally dealt in". The keeping of a place where this is done is precisely what the statute prohibits. The contention that the trial court erred in permitting the witness Woolridge, over objection, to state that the place in question was a "bucket shop" is totally without merit. Had the witness replied that the place in question was a grocery store the statement would have been no less objectionable, yet it would have been properly received. Neither answer can be regarded as a usurpation of "the functions of

both court and jury", as contended. The truth or falsity of the answer can, of course, be inquired into by cross-examination. True, both terms "bucket shop" and "grocery store" contain inferences from certain premises and are, therefore, in a sense conclusions; but they are conclusions of such common and ordinary use in our language that for the courts to prohibit their use by witnesses and to require that they be analyzed into their primary parts would be technical and finical indeed. For the courts of justice not to regard such answers as competent because conclusions rather than primary facts, would subject them to the just criticism if not the ridicule and contempt of the ordinary layman. We recognize the authorities cited by counsel that the opinions of witnesses must, ordinarily, not be received, but we regard them as beside the present question.

No evidence was presented on behalf of the defense, and there is no error assigned that the verdict is contrary to the evidence.

As a particular instance of a transaction in the place in violation of the statute, the prosecution showed a transaction there by Wirsching with one John H. Doyle. Doyle testified that on May 4, 1906, he went to Wirsching's place at about noon. He gave Wirsching \$20 with an order to sell ten shares of Philadelphia & Reading Railroad stock at a certain figure. This money and order Doyle says Wirsching took and he sent the order by telegraph to the bucket shop of Sellers Commission Company in St. Louis. The witness had been in St. Louis and knew Sellers Commission Company was a bucket shop. The witness also testified he owned no Philadelphia & Reading Railroad stock when he gave the order and the money to Wirsching, presented none and was asked for none. He also said: "No delivery was to be made on my part". "No delivery was expected to be made on my part". He received from Wirsching a memorandum of the transaction in his handwriting,

and Wirsching said he had sold at 118. The witness purchased no stock, as he says, so there was not the ordinary transaction with a stock commission merchant of a sale and purchase and thus a closing of a legitimate transaction. The witness received back no money on the transaction. The \$20 paid over to Wirsching represented what, in a legitimate transaction, would have been the "margin" advanced to insure the delivery by the seller of the stock sold, had any delivery of the stock dealt in been intended.

Complaint is made that by the instructions the jurors were not sufficiently cautioned as to the necessity of showing the offense to have been committed at the place alleged. The intimation is that the jury may have been confused and based a conviction on the fact that Wirsching was connected with the St. Louis bucket shop, even though the jurors were not convinced that Wirsching kept the place at 196 La Salle street. Error, in this connection, is predicated upon the refusal of the court to give an instruction that proof that Wirsching conducted a bucket shop elsewhere than at the building number 196 La Salle street would not "authorize or justify a conviction in this case". The case of O'Leary v. People, 88 Ill. App. 60, 68, cited upon this proposition, is not in point. The question in that case was one of variance between the charge and the proof. The charge was that the offense was committed in a certain building known as "Washington Park Club", but the evidence showed that if committed at all it was committed in a booth under a roof separated from the building by an open space. In the case at bar there is absolutely no controversy in the evidence but what the transaction upon which the charge is predicated took place at 196 La Salle street in Chicago.

We find that, under the circumstances here, there was no material error in the refusal to give this instruction and, besides instructions given, with sufficient clearness, require the jury to find Wirsching guilty only if he kept the place at 196 La Salle street. No

confusion, in this respect, could arise by reason of the evidence in the case as to the bucket shop in St. Louis.

Complaint is also made "that no instruction was given to the jury in which they were told that the burden of proof was on the People, or that the defendant, Wirsching, need not prove his innocence", and, therefore, it was error to refuse an instruction offered by the defendant embodying those propositions. To have instructed the jury that the burden of proof was on the People, simply, would have been error, for in criminal cases the rule is that the burden upon the People is to prove the defendant guilty beyond a reasonable doubt. Repeatedly, more often than necessary, the jury were, in effect, instructed that the evidence must show the defendant to be guilty beyond a reasonable doubt before they could return a verdict of guilty. It was therefore unnecessary to instruct them that he need not prove his innocence. It is not necessary to instruct a jury both affirmatively and negatively upon what is substantially the same proposition of law.

Counsel for Wirsching offered an instruction on the subject of credibility of witnesses, which was refused, and now complaint is made of the refusal. There was no conflict or contradiction in the testimony of witnesses so, in this particular case, this long instruction would have had but slight applicability. The instruction is a stereotyped one. Counsel did not even take the trouble of fitting it to the facts of the case. Indeed the very witnesses to whose testimony counsel seeks to have applied certain rules of scrutiny he himself impliedly vouches for as credible when, in the instruction he speaks of "*other* credible evidence". Under the circumstances and as offered, we find no error in the refusal of that instruction. To have given it would have tended to confuse rather than to have clarified matters for the jury. As a statement of the law to be applied to the facts in this case it was not accurate.

Another proposition advanced is that the judgment of conviction should be reversed because under the

statute, which imposes a penalty for keeping or causing to be kept any bucket shop, store or other place wherein is conducted or permitted "the pretended buying or selling of the shares of stocks or bonds of any corporation, etc.", it is necessary to show that the transactions of "pretended" buying and selling be of the shares of existing corporations. This proposition is covered and disposed of adversely to plaintiff in error by what has been said with reference to the testimony as to keeping a "bucket shop". That testimony is sufficient to sustain the verdict. Evidence of incorporation of the Philadelphia & Reading Railroad was therefore unnecessary.

We find no reversible error in the record. The judgment of the Criminal Court is affirmed.

Affirmed.

Gertrude A. Kuechle, Appellant, v. Warren Springer,
Appellee.

Gen. No. 14,056.

1. **ELECTION OF REMEDIES**—*when doctrine of, does not apply.* The doctrine of election between inconsistent remedies applies solely to the parties to a contract, as, for instance, where there has been a breach of the contract by one of the parties thereto; it has no application as between one of the parties to a contract and a third party, a stranger to the same. *Held*, in this case, that a decree cancelling a deed for fraud does not preclude a subsequent action for deceit against the person who procured the execution of such deed but was not a party thereto.

2. **DAMAGES**—*what essential to award of.* Damages which are uncertain and remote do not justify the verdict of a jury.

3. **DAMAGES**—*what allowance justified in action of deceit.* Damages which are the natural consequence of the fraud perpetrated should be allowed.

Action on the case. Appeal from the Superior Court of Cook county; the Hon. ALBERT H. FROST, Judge, presiding. Heard in this

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court at the October term, 1907. Reversed and remanded. Opinion filed December 7, 1908.

Statement by the Court. The appellant sued appellee for damages for fraudulent conduct and false representations alleged to have caused loss to appellant. The sufficiency of the declaration is not questioned. The defendant pleaded the general issue. The court instructed the jury, peremptorily, to find the defendant not guilty, which the jury did, and the court, after overruling plaintiff's motions for a new trial and in arrest of judgment, rendered judgment on the verdict.

November 24, 1888, Calvin DeWolf and Frances DeWolf, his wife, executed to William E. Slosson a lease of sub-lot 4, in Ogden's subdivision of lot 1, in block 96, in the School Section Addition to Chicago, in Cook county, Illinois, for the term of 99 years from January 1, 1889, for the annual rental of \$3,000, payable quarterly, \$750 to be paid on the first days of January, April, July and October of each year of the term.

April 4, 1889, Slosson, lessee, by written instrument of that date, sold and assigned to Warren Springer, appellee, for the expressed consideration of one dollar, his interest in said lease and premises, including a three-story and basement brick building on said premises, which had been sold by the lessors to said Slosson.

July 29, 1897, Warren Springer and his wife, Marguerite, executed to John E. Maginnis, described to be "of the city of Boston, county of Suffolk and State of Massachusetts", a quit-claim deed of all their interest in the premises first above described, for the expressed consideration of \$25,000. No mention is made of the lease in the deed. Deed recorded August 26, 1897. August 6, 1897, John E. Maginnis, described as "a bachelor, of the city of Boston", etc., executed a warranty deed to Charles Z. Miller of Chicago, of the said described premises, for the expressed consideration of \$100,000. The deed contains no mention of the lease. Deed recorded September 3, 1907.

August 6, 1907, the same day the deed was executed to Miller, he, Miller, executed to the Chicago Title and Trust Company a warranty deed, in trust, to secure the payment of certain notes, mentioned in the deed as follows: "Whereas, the grantor, Charles Z. Miller, is justly indebted upon his 83 principal promissory notes, bearing even date herewith, payable to the order of himself and by him endorsed and delivered, eleven for five hundred (500) dollars each and ten for seven hundred and fifty (750) dollars each, due one year after date, and sixty-two for one thousand (1,000) dollars each due fifteen (15) months after date. All of said notes bearing interest at six per cent per annum". No mention is made of the lease in this deed. The trust deed was recorded September 11, 1907.

September 28, 1897, an application was made to the Chicago Title and Trust Company for a guaranty policy of \$20,000 on the premises by the Lamar Shoe Company, which is the name of the shoe store in which Maginnis was engaged in business. The application stated that the improvement and leasehold were worth \$125,000. A guaranty policy was issued on the application for \$20,000 and was delivered to the defendant.

All the promissory notes mentioned were made and endorsed by Miller, as stated in the trust deed, and four of them were put in evidence by the plaintiff—three of the \$1,000 notes and one of the \$500 notes. Endorsed on each note is the following:

"TRUSTEE'S CERTIFICATE.

This is to certify that this note is one of the following eighty-three notes for the aggregate amount of seventy-five thousand dollars: Eleven notes for five hundred dollars each, ten notes for seven hundred and fifty dollars each, sixty-two notes for one thousand dollars each; secured by trust deed to Chicago Title and Trust Company, trustee, recorded in the Recorder's office of Cook county, Ill., as Doc. No. 2,586,840.

CHICAGO TITLE & TRUST COMPANY,

By Wm. C. Niblack, Secy."

Maginnis is a brother-in-law of the defendant Springer, and at the time of the transactions in question was engaged in the shoe business, in a store on the premises in question known as 188 East Monroe street.

Charles Z. Miller testified, in substance, that he paid nothing for the property, and was never able to pay for it at any time; that the deed from Maginnis to him was never delivered to him; that Maginnis took it away and recorded it or that Springer recorded it; that Springer managed the whole business. He says Springer came to his office and said he was agent for John Maginnis, who was the owner of the property, and he, as such agent, wished to sell the property to him; that the building was rented at \$9,000 per annum, and that they could easily get \$100,000 for the property, and that they, Springer and witness, could put a mortgage for \$75,000 on it and would have \$25,000 to divide. Miller also testified that he knew nothing of the leasehold and did not learn of it until two or three weeks after he executed the trust deed and notes. He says that Springer gave him \$500 for signing a bond for Maginnis relating to some coal lands in Indiana, and thinks that Springer gave him a check for the money. The witness had no property in his own name and was substantially impecunious, and it is a fair and legitimate inference that Springer, who, as the witness says, "managed the whole business", gave him the \$500 for signing the trust deed and the notes. At the time the promissory notes secured by the trust deed were ready for negotiation, Gertrude A. Kuechle and her husband were living in a flat at 4727 Lawrence avenue, in the city of Chicago. The evidence tends to prove that appellant was then the equitable owner of an undivided interest in a number of lots in Council Bluffs, Iowa, for which her husband and Richard E. Turner had paid \$18,000, each of them paying \$9,000. The title was taken in Turner's name and the plaintiff's husband, Edward J. Kuechle, had transferred his in-

terest to the plaintiff. There was an encumbrance of \$3,500 on the property. The plaintiff also owned a piece of ground, 36 acres, with a house on it, in Merrill, Lincoln county, Wisconsin, which was encumbered by a trust deed to secure the payment of \$3,500, evidenced by promissory notes. The plaintiff had assumed this encumbrance. She, by her husband, who acted as her agent, had listed the property for sale with one Silver, a real estate broker, well known to Springer, as will hereafter appear. Springer called at the plaintiff's residence in September, 1897, about eight o'clock in the evening, plaintiff and her husband being present, and stated that he had been offered a trade for the flat building in which they were living, and had come to look it over, which he did, found numerous faults with it, said he would not trade for it, and asked plaintiff and her husband if they had not something to sell, when plaintiff's husband said they had several pieces of property, but wanted most to sell the Merrill, Wisconsin, property, as they had to obtain \$3,700 or \$4,000 in money in a very short time, to save some property at Council Bluffs, Iowa. Springer said he had some splendid farms in Illinois and Indiana, and asked plaintiff's husband to come to his office that night and they could make a trade. This was declined, and the next morning plaintiff's husband, by appointment, called at Springer's office, with photographs of the Wisconsin property. The interview was without result. Edward J. Kuechle had never met Springer and there is no evidence that plaintiff had ever met him, before the evening he called at their flat. October 5, 1897, was the next time that Mr. Kuechle met Springer. He was walking on Monroe street and Springer hailed him from a buggy in which he was riding, and asked him to get in the buggy, saying he wished to talk with him. Springer then told him that his rich friend, a shoe merchant, whose shoe store was at 188 Monroe street, had recently sold that building and had taken a series of mortgage notes for

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\$75,000, and that he, Springer, could get a trade for him, Kuechle, on part of the notes, and that he could trade notes for the Merrill property. Springer also said that the building had been traded for \$100,000, and was bringing \$9,000 ground rent, and that the notes were good, dollar for dollar. Springer then left Mr. Kuechle in the buggy, went into the office of the Chicago Title & Trust Company, and returned and took Mr. Kuechle to Maginnis, at the shoe store, who agreed to trade notes for the Merrill property if Springer would go to see the property and would say it was all right. They then got into the buggy and Springer asked Mr. Kuechle how much commission he would give him if he would put the deal through, and named \$500 as the sum he would charge; but, on Kuechle's demurring, said he would make it \$300, and also said he could handle the whole thing himself, and that he would put it through. Mr. Kuechle said he had to have the cash on the notes; that the mortgage on the Council Bluffs property would be due October 12th, and that he had to have the money, and on Springer saying he would take him around, he said he would not go with him unless he could get cash on the notes. Springer then took Kuechle to the office of B. H. Silver and introduced him to Silver and a Mr. Baddeaux. Silver said the notes were good and could be cashed readily, and said to Baddeaux, "You have got a party who will cash these notes, haven't you?" and Baddeaux said "Yes", and that he would have the party at Silver's office at two o'clock. Kuechle returned to Silver's office at two o'clock and found Silver and Baddeaux there, and after waiting a while he became impatient and asked Baddeaux why he did not produce his party, when Baddeaux left the office and returned with a Mr. McKinnon, who was introduced to Kuechle as representing the Methodist Church fund, and who said they had about \$400,000 to loan, and that they were looking for those kinds of loans, especially anything guaranteed by the Chicago Title & Trust Co., and that he, Mc-

Kinnon, was ready to cash the notes then and there and give a check for them, when Kuechle said he had not the notes yet, but he would make arrangements to go to Merrill that night, and on his return would want McKinnon to cash the notes, and McKinnon said, "All right", and that he would charge 2 *per cent.* for cashing them, which Kuechle said he was willing to pay. Silver said he would charge something for bringing them together, and Kuechle said "All right." After this interview Kuechle met Springer and told him he was anxious to close the matter up, that he had to have the money by October 12th to pay on the Council Bluffs property, or he would lose the property. An arrangement was made between them to meet at the office of a Mr. Gemmill at six o'clock that evening, Kuechle to bring his abstract of title with him, and Kuechle met Springer at Gemmill's office at that time and gave the abstract to him. Gemmill then drafted a deed of the Merrill property, which was given to Kuechle, who took it to his house and he and his wife signed it and acknowledged it before a notary public. The same evening Springer and Kuechle went to the Chicago, Milwaukee & St. Paul depot to take a train for Wisconsin, and while waiting for the train Springer produced a typewritten agreement, which he asked Kuechle to sign before he, Springer, would go with him to Wisconsin. Kuechle, while objecting that the document shown to him was not what had been agreed on, said, "Mr. Springer, I haven't got time to go into other deals now. I will have to sign this, and we will go to Merrill", and then signed the document, which is as follows:

"I propose to sell your principal, John E. McGinnis, my property at Merrill, Wisconsin, subject to \$3,600, in even exchange for \$4,000 worth, face value, of trust deed notes, signed by Charles Z. Miller, and payable to the order of himself and by him endorsed, secured on the premises 188 East Monroe street, Chicago, the deed to my said property to run to said John E. Mc-

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Ginnis, your principal, and the present holder of said notes.

In consideration of your affecting said trade for me, I agree to pay your expenses in going to Merrill, Wisconsin and viewing the property and returning to Chicago, provided the deal is consummated, and a further cash commission of \$300, and to secure the payment of such commission and expenses, I agree that you may retain, until the said commissions are paid one note for \$500 on the said \$4,000 of said trust deed notes, provided that if the said trade is not consummated, you are to pay your own expenses and no commission whatever to be paid. The papers to be exchanged at Merrill, Wisconsin, if the said trade is made.

(Signed)

E. J. KUECHLE,

JOHN E. MCGINNIS

By Warren Springer, Agent''.

Springer and Kuechle then went to Merrill, where the former saw the property and said he was ready to trade, and Kuechle gave him the deed and he gave Kuechle the four notes which were put in evidence—three for \$1,000 each and one for \$500—and they both took the evening train for Chicago. The deed is a warranty deed from Gertrude A. Kuechle and her husband, Edward J. Kuechle, to John E. Maginnis of the Merrill property, by legal description, subject to an encumbrance of \$3,500 and interest. It is dated October 5, 1897, and was recorded October 6, 1897, at 11:30 o'clock a. m. Mr. Kuechle arrived in Chicago October 6th at six o'clock in the morning, and went immediately to his residence, and before he had finished his breakfast Silver came to his residence and asked him if the trade had gone through, and Kuechle told him it had, and that he had the notes and would come to his office, which he did, and there saw Silver and asked him to produce his money, in order for him, Kuechle, to get the money on the notes. Silver said Baddeaux was the financial man and Kuechle would have to do business with him. He saw Baddeaux, who pretended that he would have to see Springer before

he could do anything. Kuechle then saw McKinnon, who said he would not cash the notes, that it appeared that they were secured on the leasehold and not on the fee. Kuechle testified, without contradiction, that this was the first time he heard anything about a leasehold. Kuechle applied to a number of other persons to sell the notes, but without success.

January 20, 1898, Gertrude A. Kuechle and her husband, Edward J. Kuechle, commenced suit in the Circuit Court of Lincoln county, Wisconsin, to procure the cancellation of the deed from plaintiff and her husband to John E. Maginnis, making defendants John E. Maginnis and wife and Warren Springer and wife, and such proceedings were had in said suit that, September 24, 1898, at the September term 1898 of the court, the court decreed that the said deed "be cancelled, annulled and set aside".

The evidence of the defendant, Springer, on the trial of this cause, consisted of his own testimony, a transcript of the proceedings in the Wisconsin court above referred to, and a section of a Wisconsin statute, fixing one year as the time for redemption from any sale of lands sold in conformity with the provisions of the chapter of which the section is a part. Springer, in his testimony, did not deny the fraud charged in the declaration, nor did he produce any evidence in contradiction of it.

ALDEN, LATHAM & YOUNG, for appellant.

STEDMAN & SOELKE, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The evidence in this case discloses a deliberate, premeditated, malicious and cunningly devised scheme, by the defendant Springer and his confederates, to defraud, by means of the worthless notes of an insolvent person, unsecured by anything of value, any person whom they could induce to purchase the notes or take

them in payment for anything of value, and that the plaintiff fell a victim to this scheme. The fraud, besides being proved by the plaintiff's evidence, is impliedly admitted by the defendant's failure to produce any evidence in contradiction of it.

The chief contention of appellee's counsel is that the proceedings and decree of the Wisconsin court, in which the deed from plaintiff and her husband to John E. Maginnis was cancelled, is a bar to the present suit. Counsel contend that the prosecution of that suit by the plaintiff to a final decree was a rescission of the contract between her and John E. Maginnis, and precludes her from maintaining the present suit. Whether this contention can be sustained depends on the facts. What are the facts and the relation between the parties? The plaintiff in the present suit sues the defendant, Springer, for damages for his fraud, resulting in injury to her. Springer was not a party to the agreement for the deed from plaintiff to Maginnis, nor is he a party to the deed. He has no legal interest in either of those instruments. The sole object of the Wisconsin suit was the cancellation of the deed. No relief was sought or granted as against Springer. The only relief granted was the cancellation of the deed. Springer, having no legal interest in the subject-matter of the suit, was not a necessary party to the suit.

In *Simpson Brick Co. v. Wormley*, 61 Ill. App. 460, the suit was against Wormley and two others, and pleas were filed for all the defendants, but were subsequently withdrawn as to all defendants except Wormley, and the trial proceeded to judgment against Wormley without further action against them. A reversal was sought on the ground that there should have been a rule on the other defendants to plead and a default as against them. The court said: "The evidence shows that no one but the defendant Wormley had any interest in the subject matter of the suit, and he was the only necessary party" (*Ib.* 463), and the cause was adjudged as if Wormley had been the only defendant.

“On a written agreement the parties can only be sued in the manner in which they have made themselves liable”. Barbour on Parties to Actions, p. 176.

The question, therefore, is whether plaintiff, by bringing the Wisconsin suit, to which Springer was not a necessary party, is precluded from maintaining the present action. For the purpose of the argument Springer is to be regarded as if not made a party to the Wisconsin suit. The doctrine of election between inconsistent remedies, on which defendant's counsel rely, applies solely to the parties to a contract, as, for instance, where there has been a breach of a contract by one of the parties to the contract. It has no application as between one of the parties to a contract and a third person, a stranger to the contract.

In *Nash v. Minn. Title Ins. & Trust Co.*, 163 Mass. 574, the court say: “In rescinding a contract, and in enforcing rights growing out of such rescission, one would expect to look only to the other party to the contract. The nature and effect of such rescission are such that they can have no consequences except as against the other party to the contract”. In that case the plaintiff had purchased certain bonds of one Davis, induced thereto by alleged fraudulent representations of the defendant corporation, and, after rescinding the contract between him and Davis, he brought suit against the corporation for the fraud. In respect to this, the court say: “We do not think the plaintiff's rescission of the contract, on account of the fraud, defeats their right to recover their damages from a third party, so long as they have failed to obtain satisfaction of their injury, either by a restoration or recovery of the consideration, or otherwise”. See, also, *Mack v. Latta*, 178 N. Y. 525. We are of the opinion that the proceedings and decree in the Wisconsin suit, for the cancellation of plaintiff's deed to Maginnis, are not a bar to the present action.

Counsel for the plaintiff claim that their client is entitled to recover damages for the loss of her Council

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Bluffs property. In respect to this claim, counsel for defendant say there is no evidence that plaintiff has lost that property; also, that damages in respect to its loss are speculative and too remote. There is certainly no evidence in the record that plaintiff has lost the Council Bluffs property. It is true that evidence was offered, which, if admitted, would have tended to prove that if an encumbrance on that property, to secure payment of \$3,500, should not be removed by October 12, 1906, the encumbrance might be foreclosed, but there is no evidence that it has been foreclosed. The claim for damages for the alleged loss of the Council Bluffs property is based on the assumption that if plaintiff had not been induced by the defendant's fraud to trade for the worthless notes, and had not thus been delayed, she would have obtained the necessary money, by sale of the Wisconsin property, or otherwise, to lift the encumbrance on the Council Bluffs property, and the further assumption that, having obtained the money, she would have used it in payment of the indebtedness secured by the encumbrance. The utmost that can be said in respect to the claim is, that the plaintiff might, perhaps, have obtained the necessary money from another source, and that having obtained it, she might have applied it in payment of the indebtedness on the property. The damage is too uncertain and remote to be the basis for a verdict for damages. *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145, 149; *Bradley v. Fuller*, 118 Mass. 239; *I. B. & W. Ry. Co. v. Birney*, 71 Ill. 391.

In the last case the court say: "Damages produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, cannot be awarded as proximate or proper compensation, but only where the injury flows from the wrongful act as its natural concomitant, or as the direct result thereof. Where speculation or conjecture has to be resorted to, for the purpose of determining whether the injury results from the wrongful act or

from some other cause, then the rule of law excludes the allowance of damages for such injury”.

The evidence is that the plaintiff relied solely on the sale for cash of the Merrill, Wisconsin, property, to pay the encumbrance of \$3,500 and interest on the Council Bluffs property, and, to say the least, it is a matter of grave doubt, from the evidence, whether she could have thus raised the money. Plaintiff acquired her title to the Merrill property by deed from one Andrew Dunning, the sole consideration for which conveyance was the assumption by plaintiff of the payment of \$3,500, secured by trust deed of the property, and payable December 7, 1906. She paid out no money for the property. Miller, witness called by plaintiff, testified: “Kuechle” (meaning plaintiff’s husband and agent) “said that the Wisconsin property was not very desirable.” “I think Kuechle said that the Merrill property was not worth a great deal.” “I think my answer on the other trial that Kuechle said the notes were as good as the property in Merrill was correct”. It appears from the record that the said property was sold under a decree of the Wisconsin court, in a suit for the foreclosure of the trust deed, to which plaintiff was a party defendant and appeared and answered, and that the sale was ratified and confirmed by the court December 1, 1900.

Plaintiff’s counsel also claim as damages the plaintiff’s necessary and reasonable expense of prosecuting the suit for the cancellation of her deed to Maginnis and of her agent’s trip to Merrill to show the property to Springer. The sending or going to Merrill to show the property there to Springer, and the prosecution of the suit to cancel the deed of that property to Maginnis, on discovery of the fraud, were natural consequences of the fraud, and we perceive no good reason why plaintiff should not recover her necessary and reasonable expenses in so doing. While in the view the trial court took of the cause, it was not necessary for the court to pass on the question of damages,

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and while we do not understand that the court did pass on that question, yet, inasmuch as counsel for the parties have discussed the question of damages, and as there must be another trial of the cause, if not settled by the parties, we have thought it expedient to make the foregoing suggestions as to damages.

The judgment will be reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Abraham Jacob et al., on appeal of Charles B. Calhoun, Appellant, v. Chicago & Eastern Illinois Railroad Company, Appellee.

Gen. No. 14,068.

1. APPEALS AND ERRORS—*what exception essential to review.* An exception to the finding and judgment of the court in a cause tried without a jury must be preserved by bill of exceptions to entitle an appellant to a review of the cause on the evidence.

2. APPEALS AND ERRORS—*when denial of non-suit not subject to review.* The denial of a motion for a voluntary non-suit is not subject to review unless an exception was preserved to the ruling, and the motion, ruling and exception preserved by bill of exceptions.

Action on the case. Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

CHARLES A. BUTLER, for appellant.

CALHOUN, LYFORD & SHEEAN, for appellee; E. H. SENEFF, of counsel.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellant sued appellee in case for damages alleged

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to have been caused by appellee's breach of contract. The cause was tried by the court, without a jury, by agreement of the parties. The court found for appellee and entered judgment on the finding. The greater part of the argument of counsel for appellant is devoted to consideration of the evidence and to the contention that the finding of the court is contrary to the evidence.

It does not appear from the bill of exceptions that appellant excepted to the finding and judgment of the court, or either of them. Such exception must appear in the bill of exceptions, to entitle appellant to a review of the cause on the evidence. *Dickinson v. Gray*, 72 Ill. App. 55; *Ettlinger Printing Co. v. Copelin*, 76 *ib.* 520; *Hughey v. Rokker*, 84 *ib.* 473; Ill. Cen. R. R. Co. v. O'Keefe, 154 Ill. 508, 511; *Bailey v. Smith*, 168 *ib.* 84; *Jones v. Village of Milford*, 208 *ib.* 621.

Counsel for appellant contends that the court erred in overruling appellant's motion for leave to enter a voluntary non-suit. To entitle this contention to consideration here, it should appear in the bill of exceptions that such motion was made, the ruling of the court on the motion, and an exception by appellant. *People v. Drainage Commrs.*, 156 Ill. 614; *C. & R. I. & Pac. Ry. v. Town of Calumet*, 151 *ib.* 512, and cases cited.

It appears from the record proper that appellant excepted to the finding of the court; also that appellant moved the court for leave to take a voluntary non-suit, which motion the court denied, etc.; but motions and rulings thereon are not part of the common law record, and can only be preserved for review by a bill of exceptions. This has been decided in very numerous cases in respect to motions for new trials; but it is the law as to all motions made in the progress of a cause. *Aden v. Road District No. 3*, 197 Ill. 220.

In *Van Cott v. Sprague*, 5 Brad. 99, the court, Mr. Justice McAllister delivering the opinion, points out of what the record proper, or common law record, consists, and shows that matters not belonging to the com-

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mon law record must, if desired, be preserved by bill of exceptions.

Appellant has assigned as error the refusal of the court to hold certain propositions of law. A motion for a new trial is unnecessary when a cause is tried by the court, without a jury. *Dickinson v. Gray, supra*; *Sands v. Kagey*, 150 Ill. 109; *Union Ins. Co. v. Crosby*, 172 *ib.* 336.

Section 60 of the Practice Act, in force when this cause was heard, substitutes for a motion for a new trial, in causes tried by the court, without a jury, exceptions to the decisions of the court. Last two cases cited and *Bailey v. Smith*, 168 Ill. 84. It necessarily follows that the result of an omission in the bill of exceptions, in a cause tried by the court, to show exceptions to the finding and judgment, is the same as an omission in the bill of exceptions in a cause tried by jury, to show a motion for a new trial, the overruling thereof, and an exception to the overruling. In the latter case, viz.: where the trial was by a jury, the court, in *E. St. Louis R. R. Co. v. Cauley*, 148 Ill. 490, say: "A bill of exceptions must show the entering of a motion for a new trial, its being overruled, and an exception to the order overruling the same, before an appellate court can consider any question of the admission or sufficiency of evidence or error in giving or refusing instructions. The failure of the bill of exceptions to show this cannot be obviated by the recitals of the judgment".

Gage v. Goudy, 128 Ill. 566, was tried by the court, without a jury. The bill of exceptions failed to show an exception to the finding or judgment of the court. Held, that there was no question for the court to consider.

We are of opinion that no exception to the finding or judgment of the court appearing in the bill of exceptions, and there being no contention that there is any error of form or irregularity in the common law record, there is nothing before us for review.

In *Hawley v. Huth*, 114 Ill. App. 29, the court, in an elaborate and very able opinion, discussed the effect of an omission in the bill of exceptions to show exceptions to the finding and judgment in a cause tried by the court, and say: "In *East St. Louis Electric R. R. Co. v. Cauley*, 148 Ill. 490, it was held in that case, tried by a jury, the bill of exceptions must show an exception to an order overruling a motion for a new trial, before an appellate court could consider any question of the admission of evidence, and that where the bill of exceptions does not show an exception to the order overruling a motion for a new trial, 'whatever would be cause for a motion for a new trial stands as if not objected to'. So, in a case tried without a jury, if the defeated party does not except to the finding or the judgment, he acquiesces therein, and we think he should be held to have waived every error occurring during the trial, which he could have asserted against the finding and judgment, if he had duly excepted thereto, including rulings upon the admission or rejection of testimony. If a party has thus waived any exception he could have presented to the finding and judgment, how can he afterwards be heard to say the judgment should nevertheless be reversed because of some error in the rulings at the trial? That would be to permit him the same advantage as if he had excepted to the finding and judgment'".

The judgment will be affirmed.

Affirmed.

Ludwig v. James A. Brady Foundry Co., 145 App. 144.

John E. Ludwig, Appellee, v. James A. Brady Foundry Company, Appellant.

Gen. No. 14,072.

VERDICT—*when set aside as against the evidence.* It is the duty of the Appellate Court to set aside a verdict which is manifestly against the weight of the evidence regardless of the motive which may have influenced the jury in rendering it.

Trespass on the case. Appeal from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed December 7, 1908.

ASHCRAFT & ASHCRAFT, for appellant; E. M. ASHCRAFT, of counsel.

WALTER J. MILLER, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The declaration in this case consists of three counts, the third of which is only necessary to be considered, and which is as follows:

“Third Count. Whereas, on the 2nd day of May, 1904, by an agreement in writing attached and marked Exhibit ‘A’, and a verbal modification of this agreement, that if the plaintiff would introduce the defendant to certain persons and corporations, and the work of such persons or corporations was obtained, the defendant would pay the plaintiff the commissions indicated in agreement Exhibit ‘A’, and pursuant to said undertaking, the plaintiff began to solicit work for the defendant and to look after the work so solicited, so long as the same was to the mutual advantage of the plaintiff and defendant, and until he was requested by defendant to discontinue to look after said work, and defendant accepted said work and performed the same; and there became due plaintiff from defendant, as com-

missions on account of the agreement and modification thereof, for services rendered by plaintiff for the defendant, large sums of money, to-wit, \$3,500, and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sums of money at his request; yet the defendant, though requested, has not paid the same, nor any part thereof, to the plaintiff, but neglects and refuses to do so, to the damage of the plaintiff", etc.

Exhibit A referred to in the count is as follows:

"Chicago, May 2, 1904.

MR. JOHN E. LUDWIG,

Dear Sir: We agree to pay you a commission of 5% to solicit work for our Foundry.

All accounts so solicited subject to our approval. We will defray all expense incurred in the delivery of the castings.

Settlements of your commissions to be made with itemized statement, not later than the 15th of each following month.

This agreement to hold good on all orders so solicited by you, whether we do the work continuously or not, so long as you look after the customers to the mutual advantage of us both.

Yours very truly,

JAS. A. BRADY FDRY. CO.,

per G. S. Burtis, Treas.

Above accepted.

JOHN E. LUDWIG,

443 La Salle Ave.,
Ch'go, Ill."

The defendant pleaded the general issue. The jury found for the plaintiff and assessed his damages at the sum of \$1,076.10, from which the plaintiff remitted \$13. The defendant moved for a new trial and in arrest of judgment, which motions the court overruled and rendered judgment for \$1,063.10.

Defendant's counsel contend that the third count does not aver compliance with the alleged modified agreement; and that even though such compliance had been averred, the evidence would not sustain the decla-

ration; and that the verdict is contrary to the manifest weight of the evidence.

Plaintiff's counsel, in his argument, says, in substance, that Exhibit A was put in evidence for the purpose of fixing the basis of compensation of the plaintiff, under the special contract, and that the action was not brought on Exhibit A. We concur in this view. But, in the third count, after averring the modification to have been "that if the plaintiff would introduce the defendant to certain persons and corporations, and the work of such persons or corporations was obtained, the defendant would pay the plaintiff the commissions indicated in agreement Exhibit A", it is not averred that the plaintiff introduced the defendant to any person or corporation. The cause, however, was tried on the theory that proof of such introduction by the plaintiff is necessary to a recovery; and counsel for plaintiff substantially admits this, saying: "A special contract with regard to the work of the Morgan-Gardner Electric Co. was made between Ludwig and the James A. Brady Foundry Company, four or six days after the making of the general agreement, by which he was to get commission upon all the work done by the James A. Brady Foundry Company for the Morgan-Gardner Electric Company, upon the condition that he would introduce Mr. Meehan, superintendent of the James A. Brady Foundry Company, to the person in the Morgan-Gardner Company who signed contracts".

A stipulation between the parties, read in evidence, contains the following: "It is hereby stipulated that the sole controversy in this cause is as to whether or not the plaintiff is entitled to receive from the defendant commission for work done by the defendant for the Morgan-Gardner Electric Co.; that the amount of work done for the Morgan-Gardner Electric Co. to the time of the institution of this action was \$20,752.85", etc.

It was incumbent on the plaintiff to prove what the contract was. He testified that Robert Burtis, defendant's secretary and general manager, said to him: "If

you will get the work, John Meehan will go out there any time that you want him to, and if you get the work he will pay you your regular commission". Asked by the court to repeat the answer, he said: "He says, 'John will go out there at any time you want; John Meehan will go out there any time you want him to, to help you with the work, and if we get this work we will pay you your regular commission'." John Meehan was defendant's superintendent. Plaintiff testified that the foregoing was said by Burtis in Meehan's presence. On cross-examination of plaintiff, he testified that, in the first conversation he had with Mr. Burtis about the work of the Electric Co., Meehan being present, Burtis asked plaintiff about introducing them to the man with the Electric Co., who signed contracts. He was then asked this question: "And which one of them was it that you say told you if you would introduce them over there to the man who signed the contracts, and they got the contract, that they would pay you your commission on it?" A. "That was Mr. Burtis". Then followed a series of questions as to whether either Mr. Burtis or Mr. Meehan said this, which the witness, by his answers, evidently sought to evade, until finally yielding to persistent cross-examination, he said that the introducing Mr. Meehan to the man who signed the contracts was his own suggestion, when he was questioned and answered thus:

"Q. Well, did either of them say that, or words to that effect, that if you would introduce them over there to the man that signed the contracts, and they got the contract, you would get the commission?

A. Not that I remember of".

The witness admits that he did not know, personally, any one connected with the Morgan-Gardner Electric Co., and he testified that, by appointment made with Mr. Burtis, he went with Meehan to the office of the Electric Company, presented to Mr. Ryan, secretary and general manager of that company, Mr. Meehan's card, as if it were his own, and said to Mr. Ryan

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that Mr. Meehan was the superintendent of the foundry. In other words, that he, a person utterly unknown to Mr. Ryan, assumed to be a Mr. Meehan and introduced another Meehan to Mr. Ryan.

Mr. Mighell, general superintendent and purchasing agent of the Morgan-Gardner Electric Company, was called as a witness for plaintiff, and testified that, some days before Ludwig called at the office of the company, he had determined to buy the goods wanted from the defendant; that he had looked up different foundries and would contract with the defendant; also that he, witness, found about the Brady Foundry Co. through the superintendent of the Davis & Ludwig Co. No other witness was called by the plaintiff. Mr. Ryan testified that he first met plaintiff in his office, but didn't remember whether Mr. Meehan was present, and can't remember plaintiff introducing him to Mr. Meehan. He further testified that, before the contract with defendant was made, he had instructed Mr. Mighell to look up several foundries and report to him, which Mr. Mighell did, and selected defendant's foundry. Mr. Burtis testified that nothing was ever said in his presence, by plaintiff or any one, about plaintiff going to the Electric Co. to solicit business, and that he, witness, was never present at any conversation when it was proposed or talked of, that Ludwig would introduce witness, Meehan, or any one, to the person at the Morgan-Gardner Electric Co.'s plant who was authorized to sign contracts, and that he, witness, never said to plaintiff, in presence of Mr. Meehan, or at any time, that, if witness or the defendant succeeded in obtaining a contract from the Electric Co., plaintiff would be entitled to a commission; also that witness never, until the commencement of this suit, heard of any appointment for Mr. Meehan to meet Mr. Ryan. This witness denies, positively, every material part testified to by the plaintiff. Mr. Meehan testified that he had no conversation with plaintiff, prior to obtaining the contract with the Electric Co., and heard none, about

plaintiff introducing him to any one of the Electric Co.'s plant; that he, witness, had been at that plant from twelve to fifteen times before he was there with plaintiff, soliciting work, and had seen Mr. Mighell there. In reference to going to the Electric Co.'s plant with plaintiff, Mr. Meehan testified, in substance, that one morning, between 9 and 10 o'clock, plaintiff came to defendant's foundry with some patterns, and asked witness if he had time to go with him to Nicely Brothers, when witness said if he would wait a little he would go, and between ten and eleven o'clock they started for Nicely Brothers' place, and on their route they came to the Electric Co.'s plant, when witness said, "I guess I will run over here for a few minutes", and plaintiff said, "All right, I will go with you", and when they started to go in there, plaintiff ran up the steps ahead of witness, and as they were going into the door, plaintiff turned and asked witness for a card, and witness held out to him a package of his cards, which plaintiff took, and rushed in ahead of him; that witness was going to see Mr. Mighell about the work, but plaintiff said, "Wait a minute", and went into Mr. Ryan's office, leaving witness in a little reception room. After a minute or two plaintiff motioned witness to come in, and said to Mr. Ryan, "This is Mr. Meehan, superintendent of the James A. Brady Foundry Co.", and Mr. Ryan said that he was too busy, that they would have to excuse him, and referred them to Mr. Mighell, saying, "He looks after the buying of castings", and when they were leaving Mr. Ryan looked at the card and remarked, "You are both Meehans", and when they were outside, on their way to Nicely Brothers, witness said to plaintiff, "You didn't know Ryan", and plaintiff said, "No, I didn't know him", when witness said, "You had a lot of gall to go in there and give him one of my cards and then introduce me". Witness further testified that, up to the time that plaintiff asked him to go with him to Nicely Brothers there never had been any conversation between them, or between plaintiff or

any one else, in witness' presence, about going with plaintiff to the Electric Co.; that witness had never heard of any such arrangement. We think it unnecessary to refer further to the evidence, all of which we have carefully read and considered.

We think the verdict manifestly contrary to the preponderance of the evidence. Counsel for the defendant is apparently conscious of this, in contending that even though the verdict is against the weight of the evidence, it cannot be set aside unless it is apparent that the jury were actuated by passion or prejudice. Even, if this were the law, it would not help the plaintiff, because, assuming that the jury were men of ordinary intelligence, and that they did not misconceive the evidence, which, in view of their verdict, it is difficult to believe, they must have been moved by passion, prejudice or other improper motive. But such is not the law. It is the duty of this court to set aside a verdict which is manifestly against the weight of the evidence, regardless of the motive which may have influenced the jury in rendering it. C. & A. R. R. Co. v. Heinrich, 157 Ill. 388, 394; C. & E. R. R. Co. v. Meech, 163 *ib.* 305, 308.

We think that defendant's refused instruction 1 should have been given. Scanlan v. Chicago Union Trac. Co., 127 Ill. App. 406, 412, and cases cited.

The judgment will be reversed and the cause will be remanded.

Reversed and remanded.

William E. Love et al., Appellees, v. Percy W. Love et al., on appeal of Thomas B. Lynd et al., Appellants.

Gen. No. 14,663.

1. APPEALS AND ERRORS—*what not subject to review upon hearing of interlocutory order.* Upon an appeal from an interlocutory order the merits of the controversy not involved in the interlocutory order are not before the Appellate Court for review.

2. **RECEIVERSHIPS**—*when appointment not erroneous*. The appointment of a receiver made in the exercise of a legal discretion will not be set aside on review where no abuse of discretion appears.

Partition. Appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1908. Affirmed. Opinion filed December 7, 1908.

GARTSIDE & HUDSON, for appellants.

JULIUS STERN, for appellees.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from an interlocutory order appointing a receiver.

The appellees, claiming to be the heirs, together with Percy W. Love, of James M. Love, who departed this life December 24, 1886, leaving a will, filed a bill for the partition of certain premises described in the bill, making Percy W. Love, Thomas B. Lynd, Edward M. Lynd and others, defendants. The defendants named also claim under the will of James M. Love, deceased, which will is set out in full in the bill.

The question which claim is valid, that of the complainants or that of the defendants, depends on the construction to be given to the will. Counsel for appellants, assuming that the question as to how the will should be construed is before us on this appeal, have directed their argument mainly to the contention that the defendants above named are the parties entitled, under the will; and appellees' counsel, while contending that no question involving a construction of the will is before us on this appeal, has, presumably from abundant caution, argued that it should be construed in favor of his clients.

The question as to how the will should be construed is before the lower court for determination by that court on the final hearing. The question is not properly before us and cannot come before us otherwise than by appeal or writ of error, after a final decree in the cause

shall have been rendered by the lower court. It is not intended or contemplated by the statute authorizing appeals from interlocutory orders appointing receivers, that on such appeals questions relating to the merits of the causes in which the interlocutory orders are entered shall be considered and passed on by the reviewing court. The statute provides: "The force and effect of such order or decree, and *the proceedings in the court below shall not be stayed during the pendency of such appeal.*" Hurd's Stat. 1905, p. 234.

This being the law, the lower court, notwithstanding the appeal from the interlocutory order, might proceed to a hearing of the cause and decide the question of law at issue between the parties, viz.: as to how the will should be construed. Manifestly, the same question cannot be pending for decision in this court and in the Superior Court, in the same case and at the same time. *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250; *Smith v. Chytraus*, 152 Ill. 654; *Elliott on Civil Procedure*, sec. 541.

The sole question before us on this appeal is, whether the lower court erred in appointing a receiver. In *Railton v. The People*, 83 Ill. App. 396, we said: "Counsel confuse the interlocutory control of the property, by appointment of a receiver *pendente lite*, with a final order determinative of the rights of the litigants. It is true that the interests of appellant could not be finally disposed of in the suit until she had been given her right to be heard in defense. But here is no final adjudication. The court merely sought, by its interlocutory order, to preserve the estate until a final determination might be had."

In *High on Injunctions*, 3rd ed., p. 9, it is said: "Indeed, upon an interlocutory application for a receiver, a court of equity usually confines itself strictly to the point which it is called upon to decide, and will not go into the merits of the case at large, since the court is bound to express its opinion only to the extent necessary to show the grounds upon which it disposes of the

application". The same author says: "A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it". The receiver in this case was appointed on motion of appellees. Counsel for appellants contend that the motion was granted on insufficient evidence, and urge that the amended bill is not verified, and that an affidavit read in support of the motion is not sufficient. The original bill is sworn to, and was before the court when the motion was made; but the affidavit purporting to be in verification of the bill is the same held by this court to be insufficient in *Deimel v. Brown*, 35 Ill. App. 303, and in a number of cases following that case. The amended bill is not sworn to. The following affidavit was read in support of the motion:

"James R. Wadsworth, being duly sworn, on his oath says that he is the agent for the complainants in the above entitled cause in this behalf; that the premises named in the amended bill of complaint, heretofore filed in the above entitled cause, are improved in part by buildings erected thereon and occupied by various tenants, who have been made defendants in this cause, and whose appearance has been entered herein, excepting as to some of said premises which are at the present time vacant.

"Affiant further says, that upon inquiry made by him of said tenants, he has been informed that the monthly rentals amount to the sum of from eighty-five to ninety dollars per month, and that the rents of such as are at the date hereof occupied, amounting to at least fifty-five dollars per month, are being paid to one Jay W. Cummings and John M. Gartside, for the use of the defendants, Thomas B. Lynd and Edwina M. Lynd, as this affiant is informed and believes.

"Affiant further says that the buildings upon said premises are all at the present time in a state of bad repair, and are in need of repairs to prevent waste and decay, and that one of said buildings, located at 1308

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Seventy-first street, as he is informed, was vacated in October last because of the bad state of repairs thereon.

"Affiant further says, that the general taxes levied for the year 1906 upon all of the premises described in this cause, have been left unpaid, and said premises have been sold for non-payment of taxes; and further says not.

"(Signed)

JAMES R. WADSWORTH.

Subscribed and sworn to before me
this 16th day of January, 1908.

(Signed)

WALTER G. WISSING,

(NOTARIAL SEAL.)

Notary Public."

It is impliedly conceded by the arguments for both parties in this appeal, that the rights of the principal parties depend upon the construction to be given to the will, and this must have been apparent to the court from the will itself, which is set forth at large in the bill. It is therefore to the interest of both parties that the property in question shall be preserved till such time as the court shall construe the will. The property having been sold for taxes, the purchaser may acquire title to it. At least, the sale is a cloud on the title, which cannot be removed without payment of the taxes, and to pay the taxes it may be necessary to use the rents, and therefore to preserve them. It was largely a matter resting in the discretion of the court, to determine whether or not a receiver should be appointed, and we cannot say that the court, in determining that question as it did, abused its discretion.

The order appointing a receiver will be affirmed.

Affirmed.

Edward E. Maxwell et al., Appellees, v. Lafayette McWilliams, Appellant.

Gen. No. 14,030.

Edward E. Maxwell et al., Appellees, v. Daniel M. Lord, Appellant.

Gen. No. 14,031.

1. **RESCISSION**—*extent of relief in equity.* It is not within the province of a court of equity under the mask of a legal fiction of "rescission" to punish a fraud.

2. **FIDUCIARY RELATION**—*remedy where secret profit has been made.* One who ostensibly acts as an associate of syndicate members, when, in fact, he is acting as a promoter, is liable to his principals for the return of any secret profit received by him.

3. **APPEALS AND ERRORS**—*when finding of chancellor not disturbed as against the evidence.* If a cause has been tried before the chancellor chiefly on oral testimony, his findings upon conflicting evidence will not be disturbed on review unless clearly against the weight of the evidence.

4. **FRAUD**—*how may be established.* Although the evidence of fraud must be clear, satisfactory and persuasive, it may, notwithstanding, be circumstantial.

5. **EQUITY**—*what relief may be granted under general prayer.* Under the general prayer for relief contained in a bill in equity, relief may be granted which is consistent with the facts set up.

6. **ACCOUNTING**—*extent of equitable jurisdiction to award.* Those forming a syndicate to purchase interests in land, or the like, thereby establish a quasi-partnership or fiduciary relation which confers upon equity jurisdiction to award an accounting against those who as the purchasing agents misapply trust funds confided to them.

7. **ACCOUNTING**—*against whom decree should run.* Upon the award of an accounting to recover secret profits, not only those holding a fiduciary relation and handling money should be made the subject of a decree, but, likewise, those who have unlawfully shared in such profits.

8. **ACCOUNTING**—*what does not discharge liability.* A voluntary payment made under a mistaken view of the law to one not entitled to the accounting, does not discharge the liability to account to those parties who are entitled thereto.

Bill in chancery. Appeal from the Circuit Court of Cook county;

Maxwell v. McWilliams, 145 App. 155.

the Hon. JULIAN W. MACK, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

Statement by the Court. These cases are separate appeals from the same decree of the Circuit Court. They have been consolidated for hearing on one transcript of the record, set of abstracts and briefs. They will therefore be disposed of together.

The transcript of the record contains 1500 typewritten pages, the abstract 368 printed ones, and the various briefs and arguments in the aggregate 550 more. In this mass of matter the best method of statement of the questions involved is, we think, to give the findings and orders of the decree appealed from, and then to state the objections to the decree and the contentions involved covered by the assignment of errors by the appellants and the cross-assignment of errors by the appellees.

The decree was entered July 19, 1907.

It was after a hearing of evidence oral and documentary by the chancellor, on an amended bill filed June 28, 1906, in which Edward E. Maxwell, James H. Gilbert, Charles H. Conrad, William N. Eisendrath, Calvin M. Favorite, George Woodland, Adolph Nathan, Helen W. Hamilton and Frank T. Hamilton, Administrators of the Estate of John M. Hamilton, deceased, and Sarah M. Snitzler and John T. Snitzler, Executors of the last will and testament of John H. Snitzler, deceased, were complainants, and Lafayette McWilliams, D. W. Kimball, Daniel M. Lord and the H. G. & M. Oil Company, a corporation, were defendants, the answer and amended answer of McWilliams, Lord and Kimball thereto (the H. G. & M. Oil Company having been defaulted for want of an answer), and the replications of complainants.

Its findings, recitals and orders are:

1. That prior to December 1, 1904, McWilliams and Kimball became the joint owners of an option by means whereof they were entitled to purchase cer-

tain oil and gas leases of about 500 acres of lands in Madison county, Indiana, from one Joseph N. Tait, upon the payment to Tait of \$50,000 and the further payment of \$2,500 to one William C. Hoag for his commissions as the agent and broker of Tait in negotiating the option.

2. That being unwilling to purchase and operate said properties for their own account, but being desirous of effecting a sale thereof at a profit, McWilliams and Kimball undertook to find other persons who should become purchasers of said property at \$70,000, but failed to do so within the period of their original option.

3. That thereupon McWilliams and Kimball secured an extension of said option at the price of \$57,500, of which \$55,000 was to be paid to Tait and \$2,500 to Hoag, and associated with themselves Daniel M. Lord in a further attempt to sell said option at a profit.

4. That McWilliams, Lord and Kimball, then acting in concert, during the last days of November and the first days of December, 1904, requested Edward E. Maxwell, James H. Gilbert, Charles H. Conrad, William N. Eisendrath, Calvin M. Favorite, George Woodland, Adolph Nathan, John M. Hamilton, John H. Snitzler (said Hamilton and Snitzler having since died), to join with them, the said McWilliams, Lord and Kimball, in the purchase of said oil and gas leases, and during the course of the negotiations represented to these nine persons, Maxwell, Gilbert, Conrad, Eisendrath, Favorite, Woodland, Nathan, Hamilton and Snitzler (called hereafter in the decree "the investors"), that they, McWilliams, Lord and Kimball (called hereafter in the decree "the defendants"), had an option for the purchase of said property at the price of \$70,000; that said \$70,000 was the amount which would have to be paid to the owners of said leases, and that the investors were being offered a

chance to come into a good thing at the ground floor price.

5. That each and every one of said representations was false and fraudulent, and was known to be so by the defendants, and was knowingly made by the defendants and each of them to the investors and each of them, to induce them to purchase said property at a price higher than that at which the defendants could purchase the same under their option.

6. That the relations between McWilliams and Lord and some or all of the investors, had for many years been friendly and intimate, and that the said investors had a right to rely on the truth of the said representations; that said Maxwell, Gilbert, Conrad, Eisendrath, Favorite, Woodland and Nathan did rely on the truth of said representations and believed them to be true; that Snitzler and Hamilton died before the hearing of the cause, and there is no affirmative testimony that either of them did or did not believe or rely on said representations, or knew or did not know the true facts concerning the amount of said option price, other than the fact that the said representations were made in their presence and that they thereupon, with the other investors, made the payments hereinafter set forth; that therefore the court finds that said Hamilton and Snitzler did rely on and believe said representations; that after the making of said representations the investors paid to the defendants the following sums of money respectively:

Edward E. Maxwell,	\$11,000.
James H. Gilbert,	10,000.
Charles H. Conrad,	2,000.
William M. Eisendrath,	7,000.
Calvin M. Favorite,	7,000.
George Woodland,	1,000.
Adolph Nathan,	5,000.
John H. Snitzler,	7,000.
John M. Hamilton,	14,000.

Total,	\$64,000;
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that the defendants then and there agreed to contribute to said fund of \$70,000, as and for their respective shares of such purchase, the following sums:

Lafayette McWilliams,	\$1,000.
D. W. Kimball,	1,000.
Daniel M. Lord,	4,000.

Total, \$6,000;

that these payments were made on December 3, 1904, and that McWilliams and Kimball paid their shares to Lord on that day.

7. That contemporaneously with the payment of said sums of money, it was agreed between the investors and the defendants that the defendant Lord should take said money and examine said property, and that if certain representations hereinafter referred to, concerning the production and equipment of the property, were found by him to be true, he should exercise the said supposed option of purchase at \$70,000, and that otherwise he should return the money to the investors. Whereupon Lord, acting ostensibly as a joint investor with the others, and as their agent, and concealing from the said investors all knowledge of the fact that he was interested in making such a sale, and that he and his associates would obtain a profit if the property were taken by the investors at the price of \$70,000, accepted from them the moneys above referred to, aggregating the sum of \$64,000, made an examination of said property, used \$57,500 thereof to exercise the aforesaid secret option of himself and his co-defendants, McWilliams and Kimball, reported to the investors that he had closed the deal, caused the said property to be turned over and conveyed to the corporation hereinafter referred to, and divided the sum of \$12,500, the secret profit in the transaction aforesaid, between himself and his said associates, share and share alike. That is, Lord paid \$4,166.66 in cash to McWilliams, \$4,166.66 in cash to Kimball, and himself retained \$166.66 in cash and thereafter received from

the corporation stock of the par value of \$4,000 as being fully paid, without any further additional payment on his part, with like effect as though he had actually contributed \$4,000 to said fund of \$70,000 and had subsequently drawn the same out again on account of his share of said profit.

8. That before or at the time of the payment of the money to Lord, it was agreed by the investors and defendants that a corporation with a capital stock of \$70,000 should be formed to take and hold the title to said property, and that the investors and defendants should receive stock at par for the amount of their respective investments; that with the knowledge of each of the defendants and the active co-operation of McWilliams and Lord, a corporation was duly organized under the laws of Indiana, on December 13, 1904, with a capital stock of \$70,000, named the H. G. & M. Oil Company; that its whole capital stock was issued to the investors and defendants in amounts equal to those set out in paragraph 6 of the decree.

9. That the defendants, by virtue of the rights vested in them jointly by their said option, and in the exercise thereof, on the 8th day of December, 1904, procured an assignment of certain of said oil and gas leases to the H. G. & M. Oil Company, a copy of which said assignment is attached to the original bill as Exhibit A; that said defendants also assigned to said corporation another certain gas and oil lease to make good the total acreage which they had represented to said investors as the acreage of the property originally included in their said option; the title of a portion of the property covered by said option having failed and been found to be defective, said last mentioned lease being dated December 6, 1904, and running from one Shannon and wife to the said defendants as lessees, a copy being attached to the original bill as Exhibit B.

10. That the said corporation had not then been fully organized, and that it was mutually understood by the investors and defendants that the said corporation should acquire and hold the title to said leases and

property, and that fully paid shares of stock should be issued and delivered to each investor and defendant to represent their said respective interests.

11. That in June, 1905, said Gilbert, Hamilton and Maxwell received information which led them to suspect that the price paid for said property had been less than \$70,000; that they investigated, and in October, 1903, obtained certain information of the facts before recited in the decree, and communicated the same to the other investors, and Gilbert and Maxwell thereupon confronted the defendant Lord with the facts so discovered, whereupon Lord admitted and stated that he had participated in a secret profit as above stated, and thereupon, without the knowledge of his co-defendants, McWilliams and Kimball, paid into the treasury of said corporation the sum of \$4,000, which said payment the court finds is not to be applied on account of his obligation to the complainants herein as individuals, although the decree is not in any way to prejudice or affect the right of said Lord, if any, to recover said sum of \$4,000 from said corporation.

That in consideration of the premises, the defendants, McWilliams, Lord and Kimball, are under obligation to repay to the complainants 64/70 of \$12,500, being the sum of \$11,428.57, together with interest thereon at the rate of five per cent. per annum from December 3, 1904, to the date of the decree, being \$1,486.39, in addition, thus making a total of interest and principal of \$12,904.96, and that each complainant may have execution against the said defendants for such a proportion of said last mentioned sum as his respective investment bears to \$70,000, being as follows:

Edward E. Maxwell, 11/70,	\$2218.04.
James H. Gilbert, 10/70,	2016.40.
Charles H. Conrad, 2/70,	403.28.
William N. Eisendrath, 7/70,	1411.48.
Calvin M. Favorite, 7/70,	1411.48.
George Woodland, 1/70,	201.64.
Adolph Nathan, 5/70,	1008.20.

Maxwell v. McWilliams, 145 App. 155.

Helen W. Hamilton and Frank T. Hamilton, Administrators of the Estate of John M. Hamil- ton, deceased, 14/70,	2822.96.
Sarah M. Snitzler and John T. Snitzler, Executors of the Last Will and Testament of John H. Snitzler, deceased, 7/70,	1411.48.

\$12904.96.

12. That on the trial of the cause complainants offered evidence tending to prove that said defendants also knowingly and willfully represented and stated to the investors as an inducement to the purchase, that the property was producing and had for a period of six months prior to December 3, 1904, been producing an average daily output of one hundred barrels of oil, and was adequately equipped with first-class machinery and appliances for handling such product, and also offered evidence tending to show that said representations were false within the knowledge of the defendants, and that the complainants were induced thereby to make the investments aforesaid, and relied upon the truth thereof, and had no reason to suspect their falsity; that the defendants on their part denied the making of such representations and introduced evidence tending to disprove such allegations; that the complainants also introduced evidence tending to show that, relying on the matters last above referred to, they gave due and prompt notice of their election to rescind the said contract and tendered back to the said defendants all that they had received through said purchase; and also introduced evidence tending to show that said notice of rescission and tender was in due time and sufficient.

That the defendants offered evidence tending to show the contrary; that the court, for reasons herein-after stated, declines to make any finding in regard to the matters in this paragraph before referred to; that the court holds that the said defendants did not occupy the relation of vendors to the complainants, but only

the relation of agents, and for that reason the remedy of rescission cannot be applied, and that the sole remedy of the complainants in a court of equity is the recovery of the secret profits which the said defendants received and improperly retained while acting in the relation aforesaid; that therefore the prayer of the complainants' bill for a rescission of the contract and a return of the whole amount of the purchase money, aggregating \$64,000, is denied; that this decree, however, is without prejudice to the right of the complainants to institute proceedings at law to recover damages for the alleged fraudulent representations regarding the product, character and condition of said property; nor is the decree to be taken as a finding for or against either party upon the question of such last mentioned claim for damages in an action at law based upon such alleged false representations.

13. That the equities are in favor of the complainants.

The court therefore decrees: That in addition to the payment of the several sums of money found due from the defendants to the complainants respectively in paragraph 11 of the decree, with interest as provided, the complainants also recover of said defendants the costs of this proceeding to be taxed; that the stock in the said corporation issued to the defendants and each of them be deemed and taken to be fully paid; and that the defendants as between themselves are liable for equal shares of the amounts so recovered by the complainants, and that they may have contribution therefor from one another.

The defendants and each of them appealed from this decree as a whole, while the complainants jointly and severally prayed an appeal, which was allowed them (but which it does not appear was perfected) from so much of said finding and decree as denies the prayer of the complainants for a rescission of the contract of purchase and sale and the recovery of the said \$64,000 purchase money.

But in this appeal of the defendants McWilliams and Lord, the complainants have assigned cross-errors covering the points mentioned in their prayer for a cross-appeal, their assignment of cross-error being: "That the court erred in denying the prayer of the bill of complaint for a rescission of the contract and a return of the whole amount of the purchase money, aggregating \$64,000, together with interest thereon".

The assignment of errors by the defendants, on the other hand, complains of the relief which was granted to the complainants, alleging any decree against the defendants to be contrary to the law and the evidence. It also particularly attacks the relief granted to the administrators of Hamilton and the executors of the will of Snitzler.

The findings of fact of the decree are also questioned generally.

Specifically the findings are objected to:

1. That the defendants or either of them requested Conrad, Woodland, Hamilton and Snitzler to join with them in the purchase involved.

2. That the defendants represented to any of the investors that the defendants had an option for the purchase of the property involved for \$70,000, or that the said sum of \$70,000 was the amount which would have to be paid to the owners of said leases, or that the investors were being offered a chance to come into a good thing at the "ground floor" price.

3. That the complainants, other than the representatives of Hamilton and Snitzler, relied upon the truth of any such representations.

4. That said representations were made in the presence of said Hamilton and Snitzler, or either of them, and that Hamilton and Snitzler relied on and believed said representations.

5. That it was agreed between investors and defendants that defendant Lord should take the money contributed by the investors and defendants and examine said property, and if certain representations in said

decree referred to, concerning the production and equipment of the property, were found by him to be true, he should exercise said supposed option of purchase at \$70,000, and otherwise return the money to the complainants.

6. That Lord, while effecting the purchase, concealed from the investors all knowledge of the fact that he was interested in making such sale, and that he and his associates would obtain a profit if the property were taken by the investors at the price of \$70,000, as aforesaid.

7. That in June, 1905, Gilbert, Hamilton and Maxwell received information which led them to suspect that the price paid for the property had been less than \$70,000, and that they thereupon investigated, and in October, 1905, obtained certain knowledge of certain facts set forth in said decree.

8. That the complainants offered evidence tending to prove the representations set forth in the decree, concerning production and equipment of the property, the falsity thereof, the reliance of complainants on the representations, the due and prompt notice, when they discovered the falsity of said representations, of their election to rescind said contract, and the tender to the defendants of all they, the complainants, received through said purchase.

The specific findings of law objected to are those which hold the defendants, McWilliams, Lord and Kimball, under obligation to pay \$12,904.06 to the complainants, according to their respective investments, and that which holds that the payment of \$4,000 to said company, which was made by the defendant Lord to the corporation in October, 1905, should not be applied on account of his obligation to the complainants as individuals.

HOLT, WHEELER & SIDLEY, for appellants.

TOLMAN, REDFIELD & SEXTON, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

It is manifest that the cross-error assigned in this appeal may conveniently be disposed of first, for if, as the learned chancellor in the Circuit Court held in the 12th paragraph of the decree, the prayer of the bill for a decree of "rescission", which should vest in the three defendants the stock in the corporation which holds the leases and interests in lands which were the subject of the negotiations and business arrangements between them and the complainants, and give to complainants a decree against the defendants for all the money the complainants put into the business, with interest, is inadmissible, and the remedy prayed for impossible and inapplicable, the only relief possible on this bill, if its allegations are fully sustained, being the recovery by the complainants of the secret profits which the defendants are alleged to have received and retained in the course of the transaction, then we may properly, as did the chancellor, decline to decide between the sharply conflicting testimony as to the representations made by the defendants to the complainants prior to December 3, 1904, concerning the average daily production of the oil wells in question, or the machinery and appliances with which they were equipped.

On the other hand, should we think that his decision on the possible scope of the relief proper to be granted, if any, is incorrect, the question of these representations would be of very great and probably controlling importance.

On the findings on the issues raised between complainants and defendants on these representations might well depend the question whether the present decree should stand as a sufficient and adequate remedy for the alleged misapplication of funds entrusted by the complainants to the defendants because of the misrepresentations of the latter as to price and equality of standing, or a more drastic and far reach-

ing judgment should, without reference to any possible hardships to defendants, replace the complainants in the situation in which they were before the purchase of the oil leases by the syndicate which afterward developed into the H. G. & M. Oil Company.

Counsel for the complainants' argument on the cross-errors is made chiefly, if not altogether, on the theory that the defendants in fact and certainly in the view of equity, sold to complainants certain interests in lands, which the defendants had exercised an option previously held by them, to purchase; that this sale was effected through various fraudulent misrepresentations, and may and should be set aside, and the defendants and complainants put in as nearly as possible the position they occupied before the sale, which would leave, according to the theory of complainants, the defendants the owners of all the stock of the H. G. & M. Oil Company, and the complainants the possessors of the money they parted with in the venture which they now regret. It is true that the counsel for complainants say that the establishment of this relation of vendors and vendees, which they insist existed between defendants and complainants, is not necessary to their right to a "rescission", but we are not convinced by their argument. If this relation did not exist, then the "rescission" in question—on the assumption that the misrepresentations which would justify it have been proven—would be, as the chancellor in his opinion said, "to compel the defendants to stand in the shoes of the syndicate because of their wrong doing". It was not presumably because "of tender consideration for the consequences which would be visited on the defendants", as complainants' counsel suggests, that the chancellor found that this would be an improper thing for him to do, on the assumption that he should find for the complainants on all the controverted issues of fact, but because he thought—as we do also—that a court of chancery has no right, under the mask of a legal fiction of rescission, to

punish fraud. If "compensation has no place in the law of rescission" (Smith v. Brittenham, 109 Ill. 540), certainly punishment cannot have. Undoubtedly transactions other than sales, being vitiated by fraud, may be cancelled or set aside or held for naught, but "rescission" of a contract of sale has a defined technical meaning, and we are of the opinion that it cannot be decreed in the case at bar unless it is held that the theory of the complainants is correct that for practical and equitable purposes the defendants were at one time the owners of the oil leases which are now the property of the H. G. & M. Oil Company.

But we are no more able so to find than was the chancellor. This is not the theory of the amended bill on which the decree was rendered, nor is it the fact shown by the evidence. The allegations of the bill are that the defendants requested the complainants "to join with the defendants in the consummation of an option" and "in the formation of a corporation which should receive assignments of the leases", and that after and in consequence of certain representations the complainants paid to the defendants (or to Lord as their representative) certain sums of money, and that Lord took the money and procured from the owner of the leases an assignment to the corporation which had been, in accordance with their suggestions, organized.

The evidence presented by the complainants bears out the allegations, and it is on this different theory that the complainants' counsel rests their argument in defense against appellants' attacks of the decree which was entered.

In the contest over the errors assigned by the defendants, the position of the defendants is that while not vendors of the oil leases or interests in the lands to the complainants or to the corporation, they were vendors, dealing at arm's length and on lawful principles with the complainants, of an option to buy these oil leases from Tait; that as owners of that option they

sold it at a legitimate profit of \$12,500 to the syndicate composed of the complainants and themselves, which afterwards developed into the H. G. & M. Oil Company. The complainants' position, however, on these assigned errors is (as we cannot but view it, despite the disclaimers of their final reply brief) that the chancellor correctly decided that the defendants were neither "vendors" of oil leases or lands to the complainants, nor "vendors" of an option to purchase oil leases or lands to them, but persons who as "promoters" induced the complainants, in conjunction with themselves, to exercise the option which they (the defendants) held, and having, by false representations, while in a fiduciary relation of agency, obtained from these complainants a larger amount of money than was necessary to consummate the option, divided the excess among themselves in violation of their duty and of the trust reposed in them.

If the evidence bears out this latter position, the complainants are entitled to relief—not the relief of rescission or cancellation of a contract or of a sale, but the recovery of misused and misappropriated trust funds. This is the relief the chancellor thought the complainants entitled to and the relief which he gave them, preserving expressly to them the right to pursue at law (since the purchase which they made—involving an innocent vendor as it did—could not be rescinded or set aside) the agents or promoters charged with deceiving them as to the character of the property bought, as well as to its price, for a recovery of any further damage the purchase may have caused them.

We think that even on the assumption that everything in the way of false representation of production and equipment which the complainants charge was proved by the evidence to the satisfaction of the chancellor and of ourselves, neither he nor we could, under the law and evidence in this case, do more, and therefore we shall dismiss from consideration in this opin-

ion the conflicting and varying testimony concerning these representations and the elaborate, ingenious and very extended arguments in which the respective views of counsel are presented regarding them.

There is, however, no such assumption of our belief in the charges of misrepresentation of production and equipment to be made. Like the chancellor below, and for the same reasons, we decline to make any finding in regard thereto. Nor do we wish to discuss the testimony regarding them. It would be useless for the present purposes and injudicious if there should be a suit at law growing out of them.

The disposition of the cross-error assigned, however, leaves us to pass on the objections made in the defendants' assignment of error to the findings of fact and law in the decree.

The findings of fact have been most elaborately and exhaustively discussed by counsel, the testimony having been analyzed by them from every point of view. We have as diligently and thoroughly examined it all as though it had been primarily presented before us, as it was our duty in an equity appeal like this to do.

But it is to be remembered, nevertheless, that the evidence was, as is conceded, sharply conflicting, that the cause was tried before the chancellor on oral testimony chiefly, and that therefore on questions depending on conflicting evidence and the credibility of witnesses, the finding of the chancellor should be upheld by us unless it appears to us clearly against the weight of the evidence.

Judge Bailey said in *Metcalf v. Bradshaw*, 145 Ill. 133: "So far as the testimony of these witnesses is at variance, all we need say is, that the court saw them and heard them testify and from all the evidence found the equities of the case to be with the defendant. That finding, so far as we can see, is entitled to the credit which is ordinarily given to the finding of a court of chancery, where the evidence is given orally in open court, and on appeal it must be accepted as

conclusive, unless it clearly appears to be against the weight of the evidence”.

And Judge Magruder said in *Blomstrom v. Dux*, 175 Ill. 435, citing several prior cases to sustain his position: “The chancellor heard the testimony of the witnesses, observed their capacity and manner of testifying and could judge of the credibility of the witnesses and the weight of their evidence better than an appellate court, which sees only the cold record. Under such circumstances, the finding of fact made by the chancellor will not be disturbed unless it is manifestly against the weight of the evidence”.

We are not unmindful of the rule invoked earnestly by the counsel for defendants, that fraud and fraudulent conduct should not be presumed nor lightly inferred, but made clear by the evidence. But in reviewing the decision and finding of a chancellor who has found the evidence sufficiently clear and unambiguous to justify his decree, we are still bound by the principle above stated, and to justify our interference it must be manifest to us from the evidence that it could not have been properly held that the ground for relief was clearly proven.

We must remember too that, as the Supreme Court of the United States has said in a case relied on by the defendants, that although the evidence must be clear, satisfactory and persuasive to prove fraud, it may be circumstantial. *Lalone v. United States*, 164 U. S. 257.

We are unable to say that it is manifest to us from the evidence before us in this case that the contentions of the complainants, or any one or more of them, as to the representations of the price that would have to be paid by the defendants for the oil interests in question, in buying them for the syndicate, were not sustained.

On the principle that the chancellor was, from his position, the best judge of credibility in case of direct contradiction, it cannot be said that the evidence

lacked sufficient clearness in this regard. Without the denials of the defendants—which the chancellor, in view of all the evidence, weighed and rejected—there could certainly not be a doubt that the evidence that the defendants said to the complainants, or to most of them, that they had an option for \$70,000, was neither “vague” nor “ambiguous”.

But still more clearly, if that were possible, does it appear to us that if the credibility of contradictory witnesses is to be left to the chancellor, nothing can be urged against the clearness and definiteness with which the evidence establishes the fact that the defendants represented that “the investors were being offered a chance to come into a good thing at the ground floor price”. (Fourth paragraph of the Decree.)

This latter proposition is the core of the whole matter. It applies as well to the complainant Nathan as to the others, who swore that they never heard of the “small commission” that Nathan says McWilliams told him he expected to get. It applies to Conrad and Woodland, to whom the representations of McWilliams were repeated by Maxwell. It applies to Hamilton and Schnitzler, whose actions were consistent only, as it seems to us, with the belief that it also seems to us plain the other investors had, that they were going in practically “on the level”, and that this meant in proportionate parts of a purchase price of \$70,000. To go over the testimony in detail, to discuss and analyze it from our point of view, as it is discussed and analyzed in the arguments of counsel from theirs, would, as we have had occasion to say in similar cases, undoubtedly be unnecessary for one party and unconvincing to the other. It would therefore serve no useful purpose. But taken as a whole, particularly when leaving direct questions of conflicting credibility to the chancellor, the evidence seems to us, as clearly as it did to him, to establish the proposition that the “investors” all believed, and by the words and actions

of the defendants were led to believe, and from them had a right to believe, that they were "in on the ground floor" with the defendants, that they were partnership or syndicate associates "in a good thing", in which they were all interested in the same manner, and without profit to any which the others did not share. If Nathan's knowledge or notification that McWilliams was expecting "a small commission", "an ordinary brokerage", as he calls it, was an exception to this, nevertheless the additional profit which Nathan thought or was given to understand that McWilliams was expecting, was a very different "profit" from that taken by McWilliams and the other defendants and now claimed by them to be the legitimate result of the sale of the option to the syndicate as "arm's length" vendees at an advance of more than twenty per cent.

Not only the testimony concerning what was said, but the evidence of what was actually done and the manner in which it was done, the actions of the various parties at, before and after the payment of the money all seem to us consistent with the theory that the investors thought, that the defendants knew they thought, and allowed them to think, contrary to the fact, and indeed induced them, by their speech and actions (whatever the exact words used may have been), to think, that the syndicate were all proportionate partners, without any special or peculiar advantages to the defendants in their purchase.

It is, in connection with the other evidence, an entirely fair inference, from the selection of Mr. Lord to make the examination of the property to ascertain or verify its productivity and equipment, that those present at the meeting of December 3rd, except McWilliams and Kimball, had no knowledge or suspicion that Lord was to be a special beneficiary to the extent of \$4,000 and more if the sale went through, but was to get none of this profit if the property was rejected. It is also a fair inference that Lord, when accepting the duty confided to him, must have been fully aware

that it would not have been so devolved on him had the actual facts been known. Business men do not act that way. It is the oldest of maxims that no man is a proper judge in his own case, on the determination of which he is to reap or lose a profit. Had Mr. Lord then intended or wished that the syndicate should be fully and fairly advised of the matters on which they were acting, he would have declined the appointment, told them that they had unwittingly selected the wrong man, exposed then the profit that he and his associates were expecting to make, and abided the result. Such would have been the natural action even of persons dealing at arm's length, when the other party plainly showed that he was laboring under a misapprehension.

If we accept the findings of the chancellor as to the facts, it only becomes necessary to determine how the law should be applied to them. The chancellor did it in the most obvious manner to secure the natural and proper relief for the complainants, by making a money decree against the defendants in favor of each complainant for the portion of the additional cost to him of his holding which resulted from the illegitimate secret profit, providing for contribution among the defendants so that each should be obliged to refund what he actually secured of this profit, and leaving to the complainants, for any other claims for damages for misrepresentations and deceit of which they may be advised, their action at law. We think this method equitable and logical and in accordance with correct principles of chancery jurisdiction.

The first objection to it made by the defendants was that, assuming the facts to be correctly found by the court, "rescission, which was the only relief sought by the bill, having been denied on the facts, the court acquired no jurisdiction of the case on any equitable ground, and should have remitted the parties to the law for the relief by way of repayment of profits which was not prayed in the bill, was not incidental to the

real relief sought, and for which an action at law afforded a full and adequate remedy”.

We understand this position to be definitely abandoned by the counsel for appellants in their later argument, in which they say: “In order that this court may not be misled, as we have been, into thinking that this bill is one for rescission, by reason of its *prayer* for that relief, and for that specific relief only, we point out * * * that a careful examination of the bill fails to disclose a single allegation of fact showing a sale of oil properties or of stock by defendants to complainants. * * * The examination of the amended bill, apart from its specific prayer, convinces us that in its allegations of fact it proceeded upon a theory of joint purchase in line with the chancellor’s decree, and that the relief actually granted was covered by the prayer for general relief upon the facts, though wholly inconsistent with that specifically asked and therefore in no way incidental to it. *We do not therefore further urge a dismissal of the bill upon the mere question of pleading, that the decree entered was not justified by the allegations of the bill*”.

If this last sentence is not, however, to be construed as wholly abandoning the position previously taken and hereinbefore quoted, we have no hesitation in saying that we think the characterization of the bill in the later excerpt from defendants’ argument is accurate, and that for the reasons therein set forth the objection made that the relief granted was neither specifically prayed, nor within the frame of the bill, fails of all force. It was not specifically prayed, because the prayer did not fit the allegations of the bill. It was properly granted under the prayer for general relief, because the facts set up in the bill plainly pointed to it, and showed it both to be the proper measure of relief and the only relief possible in this proceeding.

The learned chancellor expressed in his opinion some doubt whether equity was the proper forum for the recovery which he granted, but we do not share it.

While it is true that under the law of Illinois a mere bailment will not raise a trust cognizable in equity, we think it is recognized by the decisions in Illinois, as elsewhere, that syndicate or association subscriptions to purchase land or interests in land, or perhaps any other purchasable commodity, establish, if not a partnership, at least such fiduciary relations between the associates as impose a trust character on funds confided by the others to the purchasing agents, and entitle them to ask in equity an accounting and the restoration of money improperly diverted from its intended purpose. *McDowell v. Joice*, 149 Ill. 124; *Bunn v. Schnellbacher*, 163 Ill. 328; *Salsbury v. Ware*, 183 Ill. 505.

Nor do we think the further argument forceful, that the decree in any case should be restricted to Lord, who was alone the agent in the disbursement of the money and who alone therefore improperly received and improperly diverted the money of the associates.

It would be a halting jurisprudence which did not give against the two other associates who were in the secret with Lord, who were cognizant of his plan and took an equal portion of the profit, the like remedy given against him, simply because he was given the physical control of the funds. If on no other ground, the trust character of the funds in Lord's hands, given to him for one purpose and partially diverted by him to another, authorizes a court of equity to follow the diverted moneys into the hands of persons taking it with notice that, not being required for the purchase of the oil leases, it belonged to, and should have been returned to, the investors.

On the other hand we do not regard as any better taken the point made in favor of Lord, that as he has paid \$4,000 into the treasury of the H. G. & M. Oil Co., under the belief that he was thereby doing all and more than all that could be properly asked of him, he should not be decreed to pay a similar sum to the complainants, especially as a part of it is to be paid

to complainants who acquiesced in and, as it is claimed, approved and encouraged, the payment to the corporation.

The question is not one of Mr. Lord's belief or intentions when paying the money in question. If he paid it into the treasury of the corporation under a mistaken view of his legal obligations, or without such a mistake, purely as a gratification to his sense of business honor, or with the hope and belief that it would remove irritation and resentment, well or ill-founded, against him in the minds of those with whom he desired to live in friendship, he must take the consequences of his voluntary act, modified only by the right, expressly reserved to him by the decree, to test whatever right he may have at law or equity to recover from the corporation the sum paid to it.

The corporation is a distinct entity. It was organized after the transactions which are the subject of this suit, although it was then in prospect. But it was the complainants who were primarily and directly injured by the unwarrantable conduct of the defendants, not the corporation. The right of action here enforced rested with the complainants individually, and not with the corporation. Payment to the corporation did not and could not release it.

Nor, in our opinion, is there any estoppel shown in the evidence against Maxwell's or Gilbert's recovery from Lord as from McWilliams and Kimball their portion of the diverted funds. They did not object to Lord's payment to the corporation; they indeed reservedly commended it. But they did not propose it, urge it, or recur to it after the interview in which Lord stated his intention. They expressly demanded other and much farther-reaching action of a very different sort—action the right to which in this cause has been refused them. We do not think they can be held to have estopped themselves from securing the relief which has been granted them, by not constitut-

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ing themselves advisers and counsellors of Lord to caution him against a contemplated voluntary action which they did not regard as satisfying his obligation to them.

As we have before indicated, the decree of the Circuit Court commends itself to us as the logical and proper one on this record, and it is accordingly affirmed.

Affirmed.

Robinson & Company, Appellant, v. Andrew Marr, Defendant, and Clay-Robinson & Company, Garnishees, Appellees.

Gen. No. 14,055.

1. **APPEALS AND ERRORS**—*what questions not subject to review.* Questions directly concerning only a party not joined in the appeal, will not be considered on review.

2. **PUBLICATION**—*when service by, confers jurisdiction.* Service by publication undertaken two years after the return of the attachment writ, will confer jurisdiction if such service is otherwise regular.

3. **ATTACHMENTS**—*when error to quash.* An attachment in aid should not be quashed and the garnishees discharged on the ground that the publication undertaken did not confer jurisdiction where the defendant has appeared in person and submitted himself to the jurisdiction of the court.

Attachment. Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed December 7, 1908. Rehearing denied December 21, 1908.

ALDEN, LATHAM & YOUNG, for appellant.

GEORGE V. McINTYRE, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

On June 14, 1898, one C. C. Binkley began a suit in

debt on an Illinois judgment against Andrew Marr, who resided in Iowa. The summons which was issued was returned not found, but on the same date, June 14, 1898, the plaintiff Binkley filed an affidavit and bond for an attachment in aid on account of the non-residence of the defendant Marr, and secured an attachment writ, in which "John Clay, Jr., Charles O. Robinson and Wm. H. Forest, partners doing business as Clay, Robinson & Co.", were named as garnishees. The writ was served immediately on Clay, Robinson & Co., and interrogatories to them were filed in the suit on July 2, 1898.

An answer to these interrogatories by Clay, Robinson & Co. was filed July 25, 1898, and a replication to or traverse of that answer was filed by the plaintiff on March 29, 1900. On September 13, 1902, the issues of law and fact raised by this answer and traverse were submitted by stipulation between the plaintiff and garnishees, on an agreed statement of facts, to the Circuit Court sitting without a jury. These issues related to the steps taken by the garnishees to remit the proceeds of the sale of certain cattle to Andrew Marr on the day of the garnishment, June 14, 1898. The issues were found by the Circuit Court for the garnishees and the garnishees discharged. The plaintiff appealed to the Appellate Court and on March 1, 1904, the Branch Appellate Court of this District made a decision reversing the judgment of the Circuit Court and remanding the cause to that court. The facts alluded to concerning the remittance of the funds in question will be found in the opinion handed down by the court, which is reported in 112 Ill. App. 332.

The conclusion of the opinion is: "Therefore the finding and judgment of the Circuit Court should have been against and not in favor of the garnishees. The judgment will be reversed, but as the record contains no evidence upon which we can here enter a judgment against Marr, the cause must be remanded."

The cause was redocketed in the Circuit Court April

9, 1904. The garnishees moved for leave to file an additional answer, which was granted them. On May 14, 1904, they filed such an answer, setting up an entirely different defense, namely, that the funds for which it was sought to hold them accountable never belonged to Andrew Marr, but to the First State Bank of Corwith, Iowa, and to Mary E. Marr, who received them; also that any claim that Binkley, the plaintiff, might have had had been waived and released by his actions in certain bankruptcy proceedings of Andrew Marr.

The plaintiffs on June 2, 1904, moved to strike the additional answer of the garnishees from the files, and this motion was denied. June 29, 1904, the plaintiff filed exceptions to that part of the additional answer of the garnishees which set up the foreclosure, release or estoppel of the plaintiff by his action in the bankruptcy proceedings against Marr.

July 13, 1905, the Circuit Court sustained these exceptions and struck out this portion of the additional answer of the garnishees. The other portion of the additional answer, alleging that the funds sought to be recovered by the plaintiffs from the garnishees belonged to Mary E. Marr and that she received them, is left standing undisposed of. But on May 6, 1907, an order appears in the transcript of record giving to "the *defendant*", on motion of the "defendant's attorney", leave "to file pleas herein instanter". Whether this was a mistaken entry or not, it was apparently in pursuance of it that *the garnishees*, by their attorney, filed on the same day a document which is in the transcript of record denominated as "plea", and purports to show to the court "further reason why the action against them herein should be dismissed". The "plea" alleges that there is no such record as the judgment sued on, and that the issue to be tried herein on the answer of the garnishees is, whether the property sold by the garnishees on June 14, 1898, belonged to Mary E. Marr or to the defendant, Andrew Marr,

and that this issue had been adjudicated in favor of Mary E. Marr in the bankruptcy proceedings against Andrew Marr.

May 10, 1907, the plaintiff filed exceptions to this "additional answer of the garnishees, termed a plea", as he denominated it, and moved to strike it from the files.

These exceptions and this motion have never been disposed of except as the discharge of the garnishees hereinafter described disposed of everything in the cause.

In July, 1904, on motion of the plaintiff, the papers in the cause had been amended by the addition of the words "for use of Robinson & Co., a corporation", immediately after the name of the plaintiff, so that in all cases the plaintiff was named as "C. C. Binkley for the use of Robinson & Co., a corporation". On June 25, 1907, the plaintiffs' attorneys suggested the death of the nominal plaintiff, C. C. Binkley, which was entered of record, and the cause ordered to proceed in the name of Robinson & Company, a corporation, as nominal as well as beneficial plaintiff.

During the time that the cause had been pending in the Circuit Court after its remandment by the Appellate Court, various pleadings and orders had grown out of an order of the court entered in June, 1904, on Mary E. Marr and the First State Bank of Corwith to intervene and set up such rights as they might claim. Mary E. Marr was dead and her estate had been fully administered and Andrew Marr, the defendant in this suit, filed on September 19, 1904, what he termed "a special interplea" "for the special purpose of showing the rights which Mary E. Marr had to the fund in controversy." It is entitled "C. C. Binkley v. Andrew Marr, Defendant, Clay, Robinson & Co., Garnishee", and begins, "Comes now the defendant, Andrew Marr, for the special purpose" as above stated. It is signed simply "Andrew Marr". The subsequent pleadings—consisting of demurrers, repli-

cations and exceptions and the motions and orders to which this "special interplea" of Andrew Marr gave rise—need not be detailed herein, for as we view the questions submitted to us, they are of no importance in this appeal; the only significance of the "interplea" in this appeal being in the questions which its filing raises—whether Andrew Marr has not by it so appeared in this case as to give the Circuit Court jurisdiction of him personally as defendant and of any possible effects of his in the hands of garnishees.

On June 25, 1907, also, the following orders were entered by the court: The *ad damnum* was increased from \$1,200 to \$2,000 in the *præcipe*, summons, declaration and all subsequent pleadings. A motion of the plaintiff for the default of the defendant, Andrew Marr, and for personal judgment against him for the amount stated in the affidavit for attachment with interest was denied; a motion of the garnishees, Clay, Robinson & Company, for an order to quash the writ of attachment and discharge the garnishees was granted; and thereupon an order was entered discharging said garnishees, and giving them a judgment for costs against the plaintiff.

The bill of exceptions shows that on the motion which was denied, for judgment against the defendant, the plaintiff offered in evidence a transcript of a judgment against the defendant in Ogle county, Illinois, as described in the declaration, and offered to show that Robinson & Co., the plaintiff, was, when the judgment was entered and still is, the owner of the same.

It also shows that after this motion of the plaintiff was denied, the garnishees, Clay Robinson & Co., moved for a quashing of the writ of attachment and their discharge, and that on that motion the counsel for the garnishees "offered in evidence and called the attention of the court to the *præcipe*, summons, affidavit for attachment and attachment writ, all of which were dated and issued on June 14, 1898, and offered the return of the attachment writ made on July 18,

1898, and then offered the certificate of publication and the certificate of mailing notice to the defendant, Andrew Marr, dated July 25, 1900, and July 30, 1900, respectively, which was the only evidence submitted or offered upon the hearing of said motion”.

From the judgment quashing the writ of attachment, discharging the garnishees and decreeing costs against the plaintiff in favor of the garnishees, the plaintiff appealed to this court, perfecting its appeal by executing and filing an appeal bond to the garnishees as obligees, reciting the judgment appealed from as “a judgment against the above bounden Robinson & Co. for costs of suit and a judgment discharging” the garnishees. This is the appeal before us.

Although two of the four assignments of error declare that the Circuit Court erred in denying the motion of the plaintiff for a personal judgment against the defendant, Andrew Marr, and in denying a motion of the plaintiff for a judgment in attachment against the defendant, Andrew Marr, we do not think that we can pass on these alleged errors or the action of the Circuit Court thereon. Andrew Marr is not a party to this appeal and is not in this court, nor is the appeal from any judgment in his favor.

As we regard the judgment quashing the writ of attachment and discharging the garnishees as erroneous for the reasons hereinafter stated, we shall reverse it, but again, as when the judgment in favor of the garnishees was reversed by the Branch Appellate Court, the cause must be remanded.

The only ground on which the writ of attachment was quashed and the garnishees discharged, was that on the face of the record, the court had lost jurisdiction of the cause long before the trial of the issues between the garnishees and the plaintiff which resulted in the appeal to this court in 1902.

The reason given is that the writ of attachment in aid was sued out and returned served on the garnishees in June, 1898, and no publication of it was made

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or notice of it sent to the defendant, Andrew Marr, until July, 1900.

It is conceded that there is no specific statutory limit for the time of publication and notice. The statute concerning original attachments merely provides that no default or proceeding shall be taken against any defendant not served with summons, unless he shall appear, until the expiration of ten days after the last publication, and that if for want of due publication of service the cause shall be continued, the same proceedings shall be had at a subsequent term of the court as might have been had at the term to which the writ is returnable.

The statute concerning publication in the case of attachments in aid is: "Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served with process in the original cause, notice of the pendency of the suit and of the issue and levy of the attachment, shall be given as is required in cases of original attachment, and such notification shall be sufficient to entitle the plaintiff to judgment and the right to proceed thereon against the property and estate attached and against garnishees in the same manner and with like effects as if the suit had been commenced by attachment".

It is, however, contended by the appellees that the decisions of this court in *Parker v. Scheller*, 60 Ill. App. 621, and *Britton v. Gregg*, 96 Ill. App. 29, so construe this statute as to show that "Upon the return of attachments issued in aid" means within a reasonable time thereafter, and that two years is an unreasonable time, and that the delay in publication and notice for that length of time in the present case, lost for the court all jurisdiction of everybody and everything in the cause.

Each of the cases in question was a case in which default judgments were entered against the original defendant and the appeal was by him. In *Parker v.*

Scheller, the notice was sent to a place of residence which had been indicated by an affidavit filed nearly three years before. In such a case the notice, the object of which was to inform the defendant of the pendency of the suit, might well fail to reach him. It presumably did do so in *Parker v. Scheller*, since he made default, but afterward appeared and appealed. In the case at bar the notice was sent to an address declared unqualifiedly to be the then residence of the defendant, by an affidavit of an agent of the plaintiff made and filed five days before the notice was sent in July, 1900.

This differentiates the two cases very materially, especially as subsequent proceedings show that in whatever capacity Andrew Marr appeared in the cause at bar in 1904, he had notice of it and of what was going on in it, and no default had been taken against him before he had such notice.

In *Britton v. Gregg*, 96 Ill. App. 29, it does appear that the notice was sent to the place, which by an affidavit filed about a month before, had been stated to be the place of residence of the defendant "when last heard from", and of it the court says: "The filing of the affidavit of non-residence of *Serra V. Gallivan* stating her then place of residence and the mailing of the copy of publication to her, more than two years after the return of the attachment writ, was ineffective as to her", citing *Parker v. Scheller*, 60 Ill. App. 621.

But the primary cause for the reversal of the default judgment is given in the opinion of Mr. Justice Shepard as defects in essential particulars of the original affidavit for attachment, and even if we felt obliged and inclined, on this entirely subsidiary point, to follow the decision and opinion in *Britton v. Gregg*, it would certainly be very questionable whether this alleged defect in "jurisdiction", which existed against the defendant in 1900 and 1902, was in that sense "jurisdictional" so far as the garnishees were con-

cerned, that after defending issues concerning their liability on the merits successfully in the Circuit Court, following an appeal to this court, and again contesting them unsuccessfully, then on remandment to the Circuit Court raising new issues on the merits—which are undetermined at present—these garnishees can have the whole attachment proceedings quashed as void on account of it. Our opinion is that it would not.

But at all events, whatever would have been their rights in this regard, on June 25, 1907, when this judgment was entered discharging them, if the defendant Marr had, up to that time, never appeared in the cause, nor shown that he had notice of it and opportunity to defend it, we cannot hold that there was any lack of jurisdiction over the garnishees, or over any effects or money of the defendant in their hands at that time. The defendant, against whom no judgment and not even a default had been taken (thus entirely distinguishing the case from Baldwin v. Ferguson, 35 Ill. App. 394), had appeared in the cause. He called the paper he filed an “interplea”, and he recited in it that he came into the cause for a “special purpose”. But he came into it, made himself a party to it, called himself in the paper he filed “the defendant” and, what was more important and to the purpose, was the defendant. If he had chosen to plead to the merits of the cause, he would undoubtedly, on a proper showing or terms, have been allowed to. But his appearance, such as it was, and in the manner that it was made, was quite sufficient to prevent such a consummation of this case in favor of the garnishees as occurred. Nicholes v. The People, 165 Ill. 502. They should not have been discharged, nor should the writ have been quashed for want of jurisdiction, and the judgment will be reversed and the cause remanded for further proceedings and determinations not inconsistent with this opinion.

Reversed and remanded.

Francis Perryman, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 14,063.

1. **NEGLIGENCE—*duty of gripman to child evincing intention to cross tracks.*** It is a question for the jury to determine whether a gripman has used proper care in the handling of his car where within his view a child, too young to be subject to the charge of contributory negligence, has evinced an intention of crossing the tracks in front of the car.

2. **IMPUTABLE NEGLIGENCE—*approved instruction upon subject of.*** An instruction upon this subject as follows, is approved:

"The court instructs the jury that even if you believe from the evidence that the plaintiff's mother was guilty of negligence in permitting the plaintiff to go upon the street, or that his brother was guilty of negligence in not taking proper care of him while upon the street, still such negligence, if any, upon their part cannot be charged against the plaintiff, and it is not a defense to this suit."

3. **INSTRUCTION—*when, upon subject of negligence, properly refused.*** An instruction as follows, is properly refused where the negligence of the defendant is charged to lie in running its street car so negligently that it ran against or was brought into collision with the plaintiff so that he was thereby knocked down and injured:

"If the jury believe from the evidence that the plaintiff ran into the side of the car in question, and that said car did not strike or run against the plaintiff, but that the said plaintiff ran against and struck the side of the car, then the jury must find the defendant not guilty."

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ALBERT C. BARNES, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

Statement by the Court. This is an appeal from a judgment for \$9,000 of the Superior Court of Cook county, entered April 6, 1907, against the Chicago City Railway Company in favor of Francis Perryman, a minor. The judgment was based on the verdict of a jury in an action for personal injuries.

The injury was the loss of the right leg just below the knee. The leg was there amputated in consequence of its being crushed by a street car which passed over

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it. The boy was four years old in May, 1905. The accident occurred on August 28th of that year, at about four o'clock in the afternoon, while the child was attempting to cross State street in Chicago. He lived on State street near the locality.

After the declaration had been finally amended by the withdrawal of one count and a change in the remaining one, it charged the negligence of the defendant which rendered it liable, to be, that while the plaintiff was traveling westward across State street between Taylor street and Harmon court, exercising such care as could reasonably be expected of one of his years and intelligence, the defendant's servants then in charge for the defendant of the operation and management of a street car going southward on railway tracks of the defendant on said State street, "managed and operated said street car in such a reckless, careless and improper manner" that as a direct result thereof "said street car then and there ran against or was brought into collision with the plaintiff, and he was thereby then and there knocked down and run over by said street car and one of his feet was so crushed", etc., that it became necessary to amputate it with part of the leg.

The plea of the defendant was the general issue of not guilty.

After the verdict of the jury had been rendered a motion for a new trial and a motion in arrest of judgment were made and denied. This appeal followed.

The thirty-five assignments of error made by the appellant reduce themselves in the brief and argument to these:

First. The record shows the facts to be such as to make it a matter of law that no negligence on the part of the appellant caused this accident.

Second. Even if this be not so, the finding against appellant is against the weight of the evidence.

Third. The court erred in giving to the jury, at the request of the plaintiff, two instructions in the opinion following referred to and numbered twelve

and fourteen respectively. It also erred in refusing an instruction tendered by the defendant, numbered twenty-three, which will be hereinafter set forth.

Fourth. In the examination of one witness for the plaintiff, a statement of the witness was objected to by counsel for the defendant as too indefinite and remote. The objection and a motion to strike the statement out were overruled.

WILLIAM J. HYNES, JOHN E. KEHOE and C. LEROY BROWN, for appellant.

JAMES C. MOSSHANE, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The chief contention of the appellant in this cause is that the verdict is against the weight of the evidence, for this proposition may be said to include the narrower one that there is no evidence in the record sufficient to sustain a recovery and that the court should have directed a verdict for the defendant.

We cannot, however, assent either to the proposition that the Superior court should have directed a verdict or that it should have granted a new trial after the verdict for the plaintiff was returned. We think it clearly a case for the jury and, though a close one, not free from doubt, one in which the verdict of the jury rendered, as we think it was, under adequate and accurate instructions, should not be interfered with by us. It is not manifestly against the evidence.

The facts, as we gather them from that evidence, are these:

The accident took place on State street between Taylor street and Harmon court. Harmon court extends from State street east two hundred and four feet south of where Taylor street runs into State street from the west. Neither Harmon court nor Taylor street cross State street. They end there. The little

boy injured lived with his parents in a rear apartment at 510 State street, which is three doors south of Taylor street and on the West side of State street. Five hundred and ten was one of the even numbers running from 506 to 512 given to a building of a hundred feet frontage on said west side of State street and on the southwest corner of Taylor street.

South of this building, the west side of State street to beyond a point opposite Harmon court had no buildings on it, but a system of bill-boards was the western boundary of the sidewalk.

On the other side of the street there was a continuous line of buildings from opposite Taylor street south to Harmon court. On the northeast corner of Harmon court and State street was a building with a frontage of forty feet occupied as a saloon and numbered 523 and 525. North of that was a candy store numbered 521, with a frontage of twenty feet, and a doorway about fifty feet from the corner. North of that was a junk shop numbered 519, its doorway being about seventy feet north of the corner.

State street in this locality is one hundred feet wide. Two street car tracks are laid in the centre of it, the west track for south-bound and the east track for north-bound cars.

The east sidewalk on State street was twenty feet wide, and from the sidewalk to the east car track it was about twenty-five feet. The distance between the tracks was four feet and between the rails of each track four feet eight and one half inches. Thus the distance between the east rail of the west track and the curb of the east sidewalk was about thirty-four feet, and from that rail to the building line about fifty-four feet. The street at this point is a busy one.

At about four o'clock in the afternoon of August 28, 1908, the mother of the plaintiff gave permission to him and to his older brother Edmund, who was eight years old, to go out in the street. She says that "they

wanted to go down in front and sit on the steps awhile''.

They evidently crossed the street and went to the candy store at No. 521. They were seen by several people to come from this store, go a few steps south, and then attempt to cross State street to the west. The older boy, Edmund, crossed the tracks safely; the younger one, Francis, the plaintiff, was struck by the east foot-board of a south-bound grip car which was drawing two trailers. He was knocked under the grip car and his right leg so crushed that amputation was necessary.

There is a contention between the plaintiff's and defendant's counsel as to the exact movements of the plaintiff immediately before the accident. The theory of the plaintiff's counsel is that the two boys were together until they both had crossed the east or north-bound track, that between the tracks the older boy, perhaps in fear of the coming train, so quickened his movements as to cross the western or south-bound track and nearly reach the sidewalk before the cars came, but that the younger one, fearful or confused, hesitated, slowed up or stopped just momentarily, and then, as his brother turned and beckoned to him to hasten, ran forward just in time to be caught and thrown down by the nearest foot-board of the grip car of the approaching train. That train was eighty feet in length, and had stopped at the south side of Taylor street. The computation plaintiff's counsel makes is, that as the accident happened about forty feet north of Harmon court, the train had run about 85 feet when it struck the plaintiff. It was not running at a high speed. But it is claimed by the plaintiff that it had much to do with the unfortunate accident that some fight or disturbance was going on at the time on the west side of State street near the Taylor street corner, and that to this disturbance, as the plaintiff's counsel puts it, "the gripman had been devoting his attention after starting up from Taylor street until just before strik-

ing plaintiff, when his attention was brought back to the track ahead by the hollering of persons on the east side of State street who had seen plaintiff's danger. The gripman then also hollered and attempted to stop his train and did so in a short distance, but not until the east foot-board of the grip car had struck the plaintiff''.

The theory of the defendant's counsel, on the other hand, to quote from their argument, is, "The accident happened about sixty feet north of Harmon court, * * * about the time the train stopped at Taylor street or a little before, the two little Perryman boys * * * started west from the east sidewalk on State street. They ran together across that space between the east sidewalk and the east track. When that space had been covered, the little fellow stopped. The larger boy continued on to the west, and when he reached the west sidewalk, or within a few feet of that point, he turned and beckoned and shouted for the younger child to 'come' on to the west. Meanwhile, the street car train had started and was running slowly to the south. When the car was very close, about ten feet north of plaintiff, the little boy started westward again, and before the car could be stopped came in contact with the foot-board on the east side of the grip car and was injured''.

As subsequently stated in defendant's argument, enlarging on the gripman's actions, it is "When the front of the south-bound grip train had run about twenty feet from the stopping place and was about forty feet north of plaintiff, the gripman saw plaintiff approaching the car tracks; immediately the gripman applied his brake, and checked up the speed; this brought the car well under control and it could have been stopped before reaching the line on which plaintiff had been traveling; but when the car reached a point fifteen or twenty feet north of plaintiff, the plaintiff stopped still; the place where plaintiff stopped was about the east rail of the east track, which was nine or ten feet east

of the track upon which the south-bound car was running; the gripman saw that the boy had stopped, apparently to await the passage of the train, and the gripman released his brake and put on the grip; a moment after he did this, the boy started from his position of stand-still and ran westward. The gripman immediately made efforts to stop, but as he had just released his brake he could not bring the car to a stop before plaintiff and the side of the car were brought in contact. * * * On the gripman's own testimony, the question was whether he had a right to drive the car past the boy standing at the side of the tracks. If the testimony for the plaintiff as to the gripman looking aside be believed, that testimony furnishes no ground for liability. The failure to see the child would make no difference, as the gripman would not have been required by law to stop had he seen the child. * * * It is a complete defense to the evidence of some of plaintiff's witnesses on the subject of the gripman glancing aside, to show that if the gripman had been looking at the Perryman boy as he stood on the street, the gripman would not have stopped any way, *because the little boy was then in safety and with no apparent intention of running into the course of the street car.*"

It seems to us that in the words of counsel's argument which we have italicized lies the gist of it.

If it were clear that this was what the evidence showed, the case would be easier to decide, but we by no means consider it so clear. The contention of the plaintiff is not so much that in such a case the defendant would be liable, as it is that this is not such a case.

In distinguishing the catena of authorities produced and discussed by the defendant's counsel, the plaintiff's counsel say: "These, with one or two exceptions, were cases where the children, though perhaps close to the track in some instances, were still in a safe place, and indicating no intention of crossing the track, prior to a sudden and unexpected movement to do so, resulting in their injury".

He argues that in the case at bar, the four-year old child, although perhaps in a place of safety when first seen by the gripman, was nevertheless (and that this is so even assuming the gripman's version of the accident to be correct) *indicating an intention to cross the track*. As it did indicate such an intention, the gripman, considering the infancy of the child, its inability to exercise care for its own safety, and its incapacity for contributory negligence, was held in law to anticipate that it *might* attempt to cross the track in such a manner that the car would catch and injure it. Such an anticipation imposed upon him a very high degree of care, and it was for the jury to determine whether it was given.

We are of the opinion that this argument is sound, and the conclusion that it was a question for the jury to determine whether the gripman was as careful as the law required (according to their instruction), is correct, if the premise is correct that the child was indicating an intention to cross the track.

And, moreover, we consider that this very question, whether or not the child was indicating an intention to cross the street when first seen by the gripman, was in itself another question for the jury.

This left them the judges of the facts to be legitimately inferred from all the testimony concerning the child's position, appearance and surroundings when on the street, and of the actions of the gripman at, immediately preceding, and some little time before the accident. For we cannot assent to the proposition of the defendant's counsel that it is immaterial whether or not "after the car started up from its position of standstill at Taylor street and before the accident, the gripman had turned to the northwest and by reason of his gaze being so diverted in that direction, failed to see the little boy".

It seems evident to us that it by no means follows from the fact, if it be a fact, that "the gripman started to stop just as soon as the little boy left his position of

safety and started toward the car", that there could have been under no circumstances a duty which he failed to perform because of his not having his attention properly directed before him, while coming from Taylor street southward.

If when only a few feet from the plaintiff he first saw him, it might well have been true, as he himself said it was, that although he saw the two boys, "there was nothing to indicate to him that they were together or that they had any interest in each other". But if his attention from the time that he left Taylor street had been directed to his immediate duty, it might, on the other hand, have been properly inferred from the other testimony that he would have seen the movements of these two small children from a point at least slightly further back, and seen what we have indicated was an essential part of this whole matter—that although for a moment, perhaps, standing still and, at that precise moment, "in a place of safety"—the plaintiff was, and at every moment since leaving the sidewalk had been, "indicating an intention to cross the track".

In other words, while the gripman may have believed from what he actually saw, that the child was indicating no such intention, that belief might have been erroneous (as we think it was) and the result of not seeing what he ought to have seen—the start together, the running together, the separation by the naturally greater agility of the older child, his call to the other by action and voice to come on, the fear, confusion and hesitation of the little child—all indicating his "intention to cross the street", and calling for a great degree of care and caution on the part of the gripman in running his train.

If the proper decision of this cause turns on the matters on which the witnesses are in conflict, we can find no reason for holding that the verdict of the jury, assuming it to have been based on that version of the story most favorable to the plaintiff, was clearly and

manifestly against the weight of the evidence. It is not necessary to remind us, as is often done, that it is our right and duty to weigh evidence. We are quite aware of it. But when the question of the weight of the evidence turns purely on the credibility of the respective witnesses, when, to establish the greater weight on the one side or the other, the argument used must be from their habits, appearance, business, manner of testifying, or the like, it is plain that it is the jury and not we who have the best chance and ability to reach a right decision, and that arguments and analysis of the testimony very appropriate before them can be of small service to us.

In this case, however, except as to the looking away of the gripman during his approach to the immediate locality of the accident (to which five witnesses substantially swear), we think the differences between the witnesses not very material. Some were more definite than others and their testimony as it appears in print more clearly expressed; but whether it was just after or before the east track was passed by the plaintiff, for example, that the fatal short stop, hesitation or fear appeared, is not, in our opinion, the turning point of this case, and this is all materially that the witnesses differed about.

The question, therefore, whether we should affirm this judgment or not, reduces itself to whether there is or is not shown reversible error in the rulings on the admission of evidence or on instructions.

One instance only of the first is objected to. When the witness Ash, who at the time of the accident was standing in front of 521 State street and saw it, was on the stand in direct examination, he testified that he saw at about the same time "some excitement going on at Taylor street", and that he noticed the gripman of this south-bound car looking back northward; that he couldn't tell the exact locality of the car at the time, but that it was between Taylor street and Harmon court.

At the close of the direct examination before the cross-examination began, the counsel for the defendant moved to strike out this testimony on the ground that the position of the car when the gripman was looking back was too indefinitely described. The court denied the motion.

The entire distance from Taylor street to Harmon court is only 204 feet, and the computations of plaintiff and defendant respectively fix the place of the accident at some distance between sixty-five and eighty-five feet from the point at which the grip car stopped after crossing Taylor street. We think, as we indicated above, that it was material whether the gripman looked back instead of ahead at any time after the train started from Taylor street until the accident occurred.

The court committed no error in refusing to strike out this testimony.

Examination of the instructions given to the jury convinces us that the jury were fully and fairly instructed on the law, and that all the insistence that could be properly desired by defendant was placed in the given instructions on the proposition of law that if the accident in question was due to any cause but the negligence of the defendant's servants, the defendant was not liable, and that they must not find the defendant guilty unless they believed from the evidence that the defendant's servant was so guilty of negligence which was the proximate cause of the injury. They were told in various forms that the gripman was held only to ordinary care, and that the happening of the accident in itself furnished no ground for holding the defendant liable.

It is, however, insisted that the instruction numbered twelve, tendered by the plaintiff and given by the court, as follows: "The court instructs the jury that even if you believe from the evidence that the plaintiff's mother was guilty of negligence in permitting the plaintiff to go upon the street, or that his brother was

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guilty of negligence in not taking proper care of him while upon the street, still such negligence, if any, upon their part cannot be charged against the plaintiff, and it is not a defense to this suit", was erroneous.

It is conceded by the defendant that this instruction down to the words "and it is not a defense to this suit", is unobjectionable, but it is said that the addition of these words made it misleading to the jury. We do not think so. The brother's act was not a defense to the suit, and the jury were, as we have noted, repeatedly told that if the defendant was guilty of no negligence, that was a perfect defense.

The definition of negligence in instruction fourteen tendered by the plaintiff and given by the court, is objected to as improper in an instruction although "passable" in an opinion of a court. We do not so regard it. Since its original use by Baron Alderson in 1856 in *Blythe v. The Birmingham Water Works Company*, 11 Exch. 784, it has become almost a classic in legal literature and has been quoted with approval by the Supreme Court of this State several times, as well as by that of many other jurisdictions: We see no reason to regard it as misleading or inapplicable in the context in which it was used in the instruction complained of.

Instruction numbered twenty-three, tendered by the defendant, was refused. It ran as follows:

"If the jury believe from the evidence that the plaintiff ran into the side of the car in question, and that said car did not strike or run against the plaintiff, but that the said plaintiff ran against and struck the side of the car, then the jury must find the defendant not guilty".

Its refusal is complained of as reversible error by the defendant. We do not think it should have been given. The amended declaration charged the negligence of the defendant to lie in running its street car so negligently that it ran against or was brought into collision with the plaintiff, and so that he was thereby knocked down and injured.

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It did not make any difference whether it was the end of the foot-board (as seems almost certain from the evidence) or some other part of the car which first struck the plaintiff (Chicago West Division Railway Company v. Ryan, 131 Ill. 474; South Chicago City Railway Company v. Kinnare, 216 Ill. 451), if it was through its negligent operation that the collision occurred. And even if the instruction were not in itself likely to be misleading and objectionable, it would hardly be reversible error to refuse it. The jury, as we have said, were fairly and fully instructed on the law applicable to the defendant's theory of the facts.

The judgment of the Superior Court is affirmed.

Affirmed.

John Joseph Reinisch et al., Appellants, v. Chicago & Northwestern Railway Company, Appellee.

Gen. No. 14,071.

This case is controlled by the decisions in C. B. & Q. R. R. Co. v. W. C. St. R. R. Co., 156 Ill. 255; Pennsylvania Co. v. City of Chicago, 181 Ill. 297; Doane v. Lake St. E. R. R. Co., 165 Ill. 510; and People v. General Elec. Ry. Co., 172 Ill. 129.

Bill in equity. Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

J. HENRY KRAFT, for appellants.

S. A. LYNDE, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal from a decretal order of a chancellor in the Circuit Court dismissing, for want of

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equity, on general demurrer a bill in equity, which is thus described in his argument by the counsel for complainants below and the appellants here. The bill he says sets forth: First, that the complainants are abutting and adjacent property owners on and are directly interested in Brand street in the city of Chicago; second, that except for the nuisance about to be committed by occupation of said street for railroad purposes, said street is one of the public highways of the city; third, that the Chicago & Northwestern Railway Company is about to obstruct said street with a railroad track, and is about to take possession of said street; fourth, that said Chicago & Northwestern Railway Company pretends to do so under an ordinance passed by the city council of Chicago; fifth, that no attempt has been made to comply with the statute in such case made and provided in reference to frontage consent; sixth, that no petition or frontage consent has ever been signed by the abutting property owners or filed with said city council; seventh, that the said common council of Chicago, in violation of the law, granted permission to lay down the track and to commit the nuisance; eighth, that abutting property owners protested both to the committee having the matter in charge, and to the city council, but without avail; ninth, that the railroad track creates a nuisance upon West Fullerton avenue, which is the intersecting street with Brand street, for the reason that said railroad track or switch track crosses Fullerton avenue at a sharp incline from the Fullerton avenue bridge; and tenth, that the attempt by the Chicago & Northwestern Railway Company would cause irreparable injury and damage to the abutting property owners.

The prayer is for a permanent injunction against the proposed action of the defendant.

The theory of this bill and its prayer are so inconsistent with the law of this State as it has been declared in *C., B. & Q. Railroad Company v. West Chicago Street Railroad Company*, 156 Ill. 255, and

Pennsylvania Company v. City of Chicago, 181 Ill. 297, and especially and elaborately in Doane v. Lake Street Elevated Railroad Company, 165 Ill. 510, and The People v. The General Electric Railway Company, 172 Ill. 129, with all which cases counsel is undoubtedly familiar, that no explanation of the appeal to this court is possible save that it is a necessary stepping stone to an opportunity to urge on the Supreme Court a reversal or overruling of their formerly announced doctrine. When the Doane case *supra* (which the appellants' counsel calls "a judicial announcement nullifying a wholesome statute"—meaning thereby the frontage consent statute on which he relies) was in this court, there was a dissent by one member of the court, which dissent was based on the "Frontage Act", and its supposed effect on the right of an abutting property owner in a case like this. But the dissenting judge declared that he should bow to the decision of the Supreme Court when made and meanwhile to the opinion of the majority of this court.

It is hardly reasonable to expect us now to overrule or disregard the deliberate decisions of the Supreme Court.

The decree of the Circuit Court is affirmed.

Affirmed.

John E. Kavanagh, Appellant, v. Bank of America et al., Appellees.

Gen. No. 14,014.

1. **NEGOTIABLE INSTRUMENTS**—*effect of indorsement of certificate of deposit.* An indorsement by the payee of a certificate of deposit makes it in effect payable to the bearer so that title thereto passes by mere delivery.

2. **NEGOTIABLE INSTRUMENTS**—*status of certificates of deposit.* By statute of Illinois as well as by the common law, certificates of deposit are negotiable instruments.

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3. **NEGOTIABLE INSTRUMENTS**—*when bona fide purchaser for value of certificate of deposit not subject to equitable defenses.* A bona fide purchaser for value of certificates of deposit the execution of which has been procured without fraud or deception, is not subject to equitable defenses involving the insufficiency of consideration, or the like, existing as between the maker and the original payee.

4. **RECEIVERSHIPS**—*form of order directing payment of claim.* An order directing a receiver to pay a claim allowed against an estate should not direct payment "forthwith" but should provide that such payment be made "in due course of administration".

Bill for receiver, etc. Appeal from the Superior Court of Cook county; the Hon. GEORGE A. DUPUY, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

EDWARD J. STEVENS, for appellant; DAVID K. TONE and EDGAR L. MASTERS, of counsel.

ADAMS & FROEHLICH, for appellee, Gilbert C. Pryor.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The appellant, John E. Kavanagh, filed a bill to wind up the affairs of the appellee Bank of America and for the appointment of a receiver as a means to accomplish that end. Daniel D. Healy was appointed such receiver. In the process of the administration of the bank, the marshalling of its assets and in ascertaining its liabilities, one Gilbert C. Pryor in an intervening petition presented a claim as assignee of six certificates of deposit of the Bank of America, each for the sum of \$2,500. On June 10, 1907, after a hearing before the chancellor, the claim was allowed for \$15,903.42, the amount of principal and interest due on the six certificates of deposit, and a decree entered to that purport and directing "that said receiver be and he is hereby ordered, adjudged and decreed to pay to said Gilbert C. Pryor the said sum of fifteen thousand nine hundred and three dollars and forty-

two cents (\$15,903.42) forthwith". From this finding and decree John E. Kavanagh prayed, was allowed and perfected an appeal to this court. Daniel D. Healy, the receiver, also prayed and perfected an appeal to this court, but has since caused his appeal to be dismissed.

The material findings of the decree are as follows:

"That the said Gilbert C. Pryor is the holder and owner of six certificates of deposit, each dated the 15th day of January, 1906, for twenty-five hundred dollars * * * respectively, due respectively, two in five, two in six and two in seven months after date, all of said certificates being payable to the order of F. E. Creelman and by the said F. E. Creelman endorsed in blank; that the said F. E. Creelman sold the said certificates of deposit to the Jackson Trust & Savings Bank and the Jackson Trust & Savings Bank received such certificates in the regular course of business for a valuable consideration, namely, the sum of fifteen thousand dollars * * * in money paid by the said Jackson Trust & Savings Bank to said F. E. Creelman; that said Jackson Trust & Savings Bank received all of said certificates before the maturity of any of them, and was ignorant of the defenses, if any, which said Bank of America might have or have had against the enforcement of liability on said certificates in the hands of said F. E. Creelman.

"And the Court further finds that said Jackson Trust & Savings Bank transferred the said certificates to the said petitioner, Gilbert C. Pryor, and received therefor the sum of fifteen thousand dollars * * * before the maturity thereof, and the said Gilbert C. Pryor received said certificates in the regular and ordinary course of business and was ignorant of any defense which the said Bank of America might have against the payment thereof.

"And the Court further finds that the said certificates are a good and valid claim against the estate of said Bank of America now in the hands of the receiver, Daniel D. Healy, and that the amount now due on said certificates is the sum of fifteen thousand nine hundred and three dollars and forty-two cents, * * * which

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should be allowed as a claim against the assets in the hands of the receiver of the said Bank of America.
* * *

We have examined with care all of the testimony appearing in the record, and without here again reciting such testimony, content ourselves by declaring it as our opinion that the findings of fact above recited are abundantly sustained by the proofs in the record.

The certificates in dispute are in the following form:
"Bank of America No. 20 \$2500.
 CHICAGO, JAN. 15, 1906.

F. E. Creelman has deposited in this Bank twenty five hundred dollars, payable in current funds five months from date, with interest at the rate of 3% per cent per annum on return of this certificate properly endorsed.

C. A. SAWTELLE,
Teller.

R. H. HOWE,
Cashier.

No. 3224."

Endorsed: "F. E. CREELMAN."

The other five certificates are exactly the same, with the exception of their numbers and time of payment of four of them.

Counsel for intervenor stated upon the trial that they would agree that any defense that could be made against the bank—meaning the Jackson Trust & Savings Bank—could be used against Pryor.

In view of this concession we will now determine the rights of the Jackson Trust & Savings Bank as affecting the character of the title which they transmitted to the intervenor claimant, Pryor.

While, as we have already said, the proof sustains the findings of fact in the decree, nevertheless the right of recovery depends upon the application of principles of law governing and controlling such facts.

The burden of the argument of appellant is devoted to two propositions:

First. That the Bank which acquired the certificates of deposit from Creelman is not an innocent assignee of such certificates in the usual course of busi-

ness, and that Pryor is not the holder by assignment from the bank. These contentions involve an attack upon the probative force of the facts.

Second. That "where fraud in the inception and issuance of negotiable paper is shown by the maker, the burden is on the indorser to prove himself to be an innocent holder". This raises the questions of law in the case and leaves for our decision whether the last quoted statement announces a legal proposition which, upon the facts in the record, inhibit a recovery.

First. The evidence, uncontradicted, of Lawton, the cashier of the Jackson Bank, called by appellant and made his own witness, thereby vouching for his credibility, was that he did not know how the certificates were obtained by Creelman from the Bank of America; that these certificates were purchased and received by the Jackson Bank in the regular course of business. Lawton was the cashier of the bank and as such received the certificates from Creelman. Creelman, it is true, had many other dealings with the Jackson Bank, and at the time of negotiating the certificates in suit was an officer and stockholder of the Bank of America, whose fidelity in his dealings with that bank is challenged in the bill filed for a receiver. That many irregularities were practiced by the president and other officers of the bank, to its detriment and ruin, are matters of judicial history. No knowledge that any fraud was practiced in the procuring of these six certificates from the Bank of America by Creelman or any one else, is fastened upon the Jackson Bank or its officers by the proof in the record; nor is any such knowledge reasonably inferable from any proof therein.

In the light of the stipulation orally made at the conclusion of the evidence for the defense by counsel for intervenor, and impliedly, for want of objection or challenge upon the part of any one defending, acquiesced in by appellant, we think it is immaterial whether evidence is in this record sustaining title of

Pryor in the certificates as assignee of the Jackson Bank. Mr. Adams, speaking for the intervenor, at the close of the defense said: "It is stipulated that the case shall proceed the same as if the Jackson Trust & Savings Bank were the real plaintiffs here in the place of Pryor, trustee, and that no point will be raised by reason of the fact that Pryor, trustee, failed to show that he paid any actual consideration for those certificates to the Jackson Trust & Savings Bank". This stipulation was, in its effect, a concession to appellant and favorable to the defense, as it eliminated the question of the protection which the law extends to remote assignees for value of such banking paper acquired before maturity and without knowledge, actual or imputable, of irregularities in their issue or fraud in obtaining them. This requirement was waived, and appellant is now estopped to make the objection on appeal which he impliedly, at least, waived on the trial. Aside, however, from these considerations, we find evidence in the record, uncontradicted, that Pryor actually paid the Jackson Bank \$15,000 and accrued interest for the certificates at the time they were delivered to him, before their maturity. Such delivery by the Jackson Bank without further endorsement was sufficient to vest the title to them in Pryor. The indorsement by Creelman of these certificates made them, in legal effect, payable to bearer, so that the title to them would pass by delivery to a third party, and no further indorsement was needed to pass the title. Authorities sustaining this proposition will be found in the *Encyclopaedia of Law & Procedure*, vol. 7, p. 759, and cases there cited.

Second. It is contended that the certificates of deposit are not negotiable instruments within the meaning of the statutes of this state on that subject, and not being negotiable the Bank of America may avail of all defenses, legal and equitable, which it might make were such certificates in the hands of the original owner. It is further urged that these certificates are

not negotiable under the Negotiable Instrument Act. Chapter 98, R. S. and Sections 3 and 4, are cited in support of such claim.

Section 3 provides that "All promissory notes, bonds, due-bills and other instruments in writing made or to be made by any person * * * whereby such person promises or agrees to pay any sum of money * * * or acknowledges any sum of money * * * to be due to any other person, shall be taken to be due and payable, the sum of money * * * therein mentioned by virtue thereof to be due and payable as therein expressed".

The certificates in question contain the quality and *indicia* of instruments in writing made by the Bank of America—an artificial person promising to pay a sum certain to a person named, at a definite time, with interest at a specified rate on surrender of the certificates properly indorsed. The statute is not confined in its operation to promissory notes, bills of exchange or due-bills, but includes instruments in writing of the nature of these certificates. To obtain payment when due, the certificates must be surrendered duly indorsed. The indorsement means that of the person named in the certificate. When so indorsed and offered for surrender, the amount due is payable to the person presenting the same for surrender and payment. The certificates when indorsed in blank are, by operation of law, payable to bearer.

Section 4 *supra* provides that "any such note, bond, bill or other instrument in writing, payable to any person named as payee therein, shall be assignable by indorsement thereon under the hand of such person. * * *" Applying this section to the certificates, the person named therein, F. E. Creelman, is the payee, and they were assignable by his indorsement under his hand. The certificates are therefore negotiable instruments and were assignable by the indorsement of Creelman and payable to the person to whom they were delivered upon surrender. Furthermore, it was

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decided in *Telford v. Patton*, 144 Ill. 611, that a certificate of deposit is in fact and law a promissory note for the payment of money. *Beckstrom v. Krone*, 125 Ill. App. 376.

We think that in every material particular the certificates of deposit have all the essential qualities of a promissory note as defined in *Dorsey v. Wolff*, 142 Ill. 589, where the court say: "Various definitions have been given of a promissory note. In general terms, it may be defined to be a written promise by one person to pay another person therein named, or order, a fixed sum of money at all events and at a time specified therein, or at a time which certainly must arrive".

Certificates of deposit of the character of those in the record pertain to the business of banking, and are issued, generally, in the usual course of the business of bankers. They are as well recognized and understood in the business world of today as a legitimate method and means of banking, as the dealing of bankers in domestic and foreign bills of exchange, due bills and other negotiable paper, have been for centuries recognized and understood as the major part of the active business of bankers and banking. These certificates were issued by the accredited officers of the Bank of America to Creelman in the usual course of the business of the bank. They passed current among bankers as assignable, negotiable paper. As we have hereinbefore demonstrated, they are negotiable instruments, the title to which passes by indorsement and delivery. But it is insisted that there are equitable defenses to the certificates between the maker and Creelman, and that those defenses can be successfully interposed against the intervenor and the assignee, the Jackson Bank. These defenses go, in the main, to the adequacy of the consideration moving from Creelman to the bank, involving also the integrity of the Bank of America's executive officers. Whatever the facts regarding such contentions may be, the record fails to connect either the officers of the Jackson Bank or

Pryor with knowledge, in the slightest degree, of any illegal conduct or fraud or conspiracy between the bank's officers and Creelman in the obtaining of the certificates. The whole argument rests for its support in surmise and conjecture, upon the apparent assumption that Creelman, in his dealings with the Jackson Bank, had developed such a character as an unsound and unsafe financier that his possession of the certificates was sufficient to raise a presumption that he obtained them irregularly and that they were not issued to him by the Bank of America in the regular course of its business. With proof that the certificates were acquired by the Jackson Bank from Creelman for full value paid by the bank to Creelman, that for such consideration they were indorsed and delivered by Creelman to the Jackson Bank before maturity, and that they were subsequently delivered by the bank, without further indorsement, to Pryor, the latter made a *prima facie* case against the receiver for an allowance of the amount of the principal and interest due upon them.

The evidence given in defense failed to fasten upon either the Jackson Bank or Pryor knowledge of any fraud or irregularity in their issue, or that they were in fact issued without consideration. The fact, if it be a fact, that the consideration for the issue of the certificates was inadequate, or that the officers of the Bank of America issued them without due regard to their duty as officers of the bank, or in disregard of such duty, did not impute knowledge to the Jackson Bank or Pryor of these derelictions upon the part of the bank's officers, making it necessary for Pryor to put in any rebutting proof. There is no pretense that any fraud or deception was practiced by Creelman in procuring the execution and delivery of the six certificates to him by the Bank of America, nor is there any evidence that they were not issued in the usual course of the business of the Bank of America. Fraud or deception necessary to invalidate the certificates, must

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have been practiced in the obtaining of them in the first instance. Inadequacy of consideration will not invalidate them in the hands of an innocent holder for value before maturity. *Martina v. Muhlke*, 186 Ill. 330; *Richelieu Hotel Co. v. Mil. Enc. Co.*, 140 *ibid.* 257; *Bradwell v. Pryor*, 221 *ibid.* 606; *Connolly, Admr., v. Dammann*, 232 *ibid.* 175.

Lawton, the cashier, was the officer of the bank who bought the certificates from Creelman for the Jackson Bank, and we see nothing in this record needing any contradiction by Eagan, the president of the Jackson Bank, or justifying any inference that Eagan had any knowledge of any frauds by the bank officers in issuing the certificates or on the part of Creelman in obtaining them.

There is nothing in the reported conversation between Daoust of the Defiance Bank and Eagan which tends to charge Eagan with knowledge of any irregularities or frauds in the issuing of the certificates to Creelman, imposing upon Eagan the necessity of testifying in contradiction. Nothing in this record tends to prove a common design on the part of Creelman and the officers of the Bank of America and any officers of the Jackson Bank of conspiring to defraud the Bank of America in procuring the issuance of the six certificates of deposit in dispute. Nor do any of the cases cited by appellant hold to any such doctrine on facts anywhere near similar to those in the case at bar.

The objection is made that the direction in the decree to the receiver, to pay the amount found due on the certificates "forthwith" is contrary to the usual course and practice in cases of claims ordered paid by receivers in liquidation proceedings, and that the order should have been that the amount found due should be paid by the receiver in the due course of the administration of the bank's estate. The costs of liquidation, including receiver's charges, are primarily payable from the assets of a concern in liquidation

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before the receiver pays other claims. We think this objection is well taken, but it does not necessarily require a reversal of the chancellor's decree.

The decree of the Superior Court will be modified by striking out of it the last word thereof, viz, "forth-with", and inserting in its place the words, "in due course of the administration of the estate of said Bank of America in liquidation in this court".

And as so modified the decree of the Superior Court is affirmed.

Affirmed.

**John E. Kavanagh, Appellant, v. Bank of America
et al., Appellees.**

Gen. No. 14,036.

This case is controlled by the decision in *Kavanagh v. Bank of America, ante*, p. 201.

Bill for receiver, etc. Appeal from the Superior Court of Cook county; the Hon. GEORGE A. DUPUY, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

EDWARD J. STEVENS, for appellant; EDGAR L. MASTERS and DAVID K. TONE, of counsel.

BULKLEY, GRAY & MORE, for appellee; ALBERT S. EAGAN and C. PAUL TALLMADGE, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

John E. Kavanagh, the appellant, filed a bill in the Superior Court of Cook county, seeking to wind up the business and affairs of the appellee Bank of America, an Illinois corporation, of which he was a stockholder.

and for the appointment of a receiver for that purpose.

Daniel D. Healy was appointed receiver, and in the order of appointment it was directed that the affairs of the bank be wound up and that the receiver proceed with all convenient speed to collect in and distribute its assets under the direction of the court, etc.

On April 2, 1906, leave was given Alberta S. Eagan to file, and in pursuance of such leave she did file, an intervening petition, setting forth that she was the owner and holder of three certificates of deposit of the Bank of America, each for the sum of \$500; that the same were transferred to her by the payee in the certificates mentioned, F. M. Creelman, for a valuable consideration paid by her to said Creelman therefor; that said certificates were all dated January 13, 1906, and were payable respectively in three, four and five months after their date, with interest at the rate of three per cent. per annum, upon surrender of the certificates properly indorsed.

Daniel D. Healy as receiver answered the intervening petition, in which answer he charged that the certificates were obtained from the Bank of America by fraud and conspiracy between certain of the officers of the Bank of America and the Jackson Trust & Savings Bank, among others, William H. Eagan, the then president of the Jackson Bank, and further charging that the interest of William H. Eagan and that of the intervenor, Alberta S. Eagan, in said certificates, are the same, and that the name of Alberta S. Eagan was used by William H. Eagan for the purpose of making it appear that the latter was an innocent purchaser for value, but that in fact said Alberta S. Eagan was a mere dummy, or that William H. Eagan was the agent of Alberta S. Eagan in procuring the certificates to be delivered by F. M. Creelman, and that Alberta S. Eagan had notice on January 13, 1906, the date of the certificates, that F. M. Creelman had no money on

deposit in the Bank of America, but that on the contrary he was indebted to that bank.

On the hearing the intervenor produced as a witness C. A. Sawtelle, who was a teller in the Bank of America at the time the certificates of deposit were issued, and whose name is signed to each of the certificates, and he testified that his name and that of R. H. Howe, assistant cashier of the issuing bank, were upon the certificates; that the indorsement upon the certificates was that of F. M. Creelman; that the certificates were issued in the regular course of the business of the bank, and that he knew nothing against their validity at the time they were issued. The certificates were then offered in evidence and the intervenor rested her case.

The depositions of William H. Eagan and Alberta S. Eagan, the intervenor, read in evidence in support of her petition, tend to prove that William H. Eagan loaned to F. E. and F. M. Creelman \$1,500 of the money of Alberta S. Eagan, taking as security their note and the bonds of the Lattonier Land Company to the amount of three thousand dollars; that upon request of F. M. Creelman, William H. Eagan changed the loan by surrendering the Lattonier bonds and the note of F. E. and F. M. Creelman, and took the certificates of deposit in evidence from F. M. Creelman in payment of the loan; that the certificates were so taken before the maturity of any of them, and without any knowledge of any defenses thereto by the Bank of America; that William H. Eagan acted in these dealings as the agent of Alberta S. Eagan.

Much evidence was submitted in defense of Mrs. Eagan's claim, tending to prove mismanagement and bad business judgment upon the part of the Bank of America and some shrewd manipulations on the part of some of the officers of the Jackson Bank, in disposing of some securities of doubtful value to the Bank of America. But we are unable to find any testimony in this record affecting the *bona fides* of the

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dealings of Mrs. Eagan with the Creelmans, or imputing to her knowledge of any irregularities in the issuing of the certificates here involved, if any irregularities in fact existed.

On April 15, 1907, the chancellor, after hearing all the proofs appearing in the record, found that the intervenor, Alberta S. Eagan, was the holder and owner of the three certificates of deposit, and that she was entitled to be paid out of the funds of the Bank of America in the hands of the receiver, upon surrender and cancellation of the three certificates, the sum of \$1,556.25, the principal and interest due thereon, and ordering Healy, as receiver, to pay that amount out of the funds of the Bank of America.

The legal questions here involved are relatively the same as those in a case brought by appellant on appeal from the allowance of the claim of the intervening petitioner, Gilbert C. Pryor, and numbered in this Court 14014, in which we have this day handed down our opinion. *Ante*, p. 201. We refer, without here again repeating, to our opinion in the Pryor case, for a statement of the law of this case, as well as to the cases there cited in support of our reasoning. They are equally as decisive of the questions here raised as there involved, and we would regard it as a work of supererogation, never to be indulged or tolerated, to again repeat here what we have so decisively said in the Pryor case.

The three certificates of deposit of the Bank of America in dispute were issued in due course of the bank's banking business. They are negotiable instruments. The intervenor, Alberta S. Eagan, acquired ownership of them before maturity and for a valuable consideration, without knowledge, actual or imputable to her, of any defenses to them by the Bank of America.

The decree of the Superior Court is sustained by proof and legal precedent, and it is therefore affirmed.

Affirmed.

John P. Foss, Appellant, v. The Peoples Gas Light & Coke Company, Appellee.

Gen. No. 14,048.

1. *LIS PENDENS*—*operation of doctrine of*. One who acquires rights in corporate stock during the pendency of litigation involving the determination of the ownership of such stock, takes subject to all of the infirmities of title existing in his assignor.

2. *AMENDMENTS AND JEOPAILS*—*what not abuse of discretion*. It is not an abuse of discretion to refuse to allow an amendment of a bill of complaint at the time of the entry of a final decree thereon upon demurrer sustained thereto; the application to amend being two months after the hearing upon the demurrer, being the second which had been made, the first having been granted.

3. *PLEADING*—*what not legal averment of status as stockholder*. *Held*, that the following allegation in that it did not set up facts, failed legally to allege the ownership of stock: "That in or about the year 1857 he became, ever since has been and now is, a stockholder of the People's Gas Light & Coke Company, and the owner of 1,500 shares, of the par value of fifty dollars each, of the original capital stock of the said defendant corporation."

4. *PLEADING*—*when indefiniteness of demand raises presumption of laches*. The allegation of a demand upon the defendant that a right of the plaintiff be accorded him being made without date, may be presumed to have been made but shortly before the institution of the suit, and if having been so made would have then in fact have been made at a time when the right would have been lost by virtue of laches, the pleading is insufficient, and its insufficiency may be availed of by general demurrer.

5. *STATUTE OF LIMITATIONS*—*availability of, as between corporation and stockholder*. The Statute of Limitations as well as the doctrine of laches may be availed of by a corporation against a stockholder.

6. *LACHES*—*what constitutes as against stockholder*. Fifty years of unexplained delay in asserting rights of accounting and participation in stock increases constitutes laches and bars the action.

Bill for accounting. Appeal from the Circuit Court of Cook county; the Hon. JULIAN W. MACK, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

Statement by the Court. John P. Foss, the appellant, filed in the Circuit Court a bill, not under oath,

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praying for an accounting from and a receiver for the appellee, The Peoples Gas Light & Coke Company.

The right to the relief sought was predicated upon the alleged fact that in or about the year 1857 Foss became and ever since said date has been the owner of 1,500 shares of the original capital stock, constituting one-fifteenth part of such original corporate stock, of the Gas Company, said stock being of the par value of \$50 a share; that from such ownership he became entitled to fifteen per cent. of the increased capital stock of the Gas Company from time to time as such capital was increased; that the Gas Company absorbed other gas companies at various times, and on such occasions increased its capital stock. Foss alleges that the Gas Company has kept him in ignorance of its dealings, has failed to pay him dividends upon his stock, or to allot him *pro rata* additional shares of stock at any of the times when it increased its capital stock. The bill further charges that the Gas Company has acquired stocks, bonds, and other securities of other companies by consolidation and that the same is of great value, and that they have in whole or in part been distributed among various so-called "favored" stockholders, but that Foss has been excluded from the benefits of such distribution. The bill then proceeds to charge, as disclosed by the abstract, that "although complainant has demanded the proportion of the capital stock of said company distributable to him by reason of his original holdings, and the increase in said capital, and has demanded an account from defendant of and concerning its business and affairs since complainant became a stockholder therein, and of the amount of the profits distributable to its stockholders as aforesaid, and of the amount and disposition of the profits distributable to complainant upon account of his said holdings, but heretofore and now withheld from complainant by defendant, and although complainant has demanded from defendant, through its officers and agents, the privilege of in-

specting the books, records and papers of defendant to which complainant is entitled as a stockholder as aforesaid, defendant and its officers have hitherto failed, neglected and refused and still refuse to account to complainant as aforesaid, or to permit complainant to examine the books, papers and records of defendant or to deliver to complainant the proportion of the capital securities and profits of defendant to which complainant is entitled, as aforesaid; and the officers and agents of defendant are fraudulently diverting the revenue, gains and profits of said corporation from the proper channel and from its stockholders, and applying said revenue, gains and profits to the benefit of certain of the stockholders, thereby defrauding complainant and other of said stockholders of his and their rights in the premises'', etc.

To this bill the Gas Company interposed a general demurrer, which, after a hearing and argument by counsel for the several parties, being sustained, Foss asked and obtained leave to file an amended bill.

On July 3, 1905, Foss filed his amended bill, which, while setting forth with more particularity many of the averments of ultimate facts appearing in the original bill, in no substantial particular affects the rights of the parties as they were made to appear by the averments of the original bill.

It appears from the amended bill that the Gas Company came into existence under a special charter granted by the legislature of this State approved February 12, 1855, and that the same was amended February 7, 1865; that the charter conferred the power to make and vend gas for illuminating and other purposes in the city of Chicago, and to do all things and to acquire and own all property necessary to that end; recites various public acts affecting the Gas Company and its business, including the right to acquire by purchase, merger or otherwise, other gas plants; that as it lawfully might, it acquired in various ways the property and business of the Chicago Gas Light & Coke

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Company, Consumers Gas Company, Equitable Gas Light & Fuel Company, Suburban Gas Company, Lake Gas Company, Hyde Park Gas Company, The Mutual Fuel Gas Company and the Calumet Gas Company; that the original capital stock was in the sum of \$500,000, and that it has since been increased until it now amounts to \$32,969,100 of stock outstanding.

On March 14, 1906, one Samuel Doll filed his petition for permission to intervene and be made a party defendant to said amended bill, for the reason that on March 8, 1906, Foss assigned unto him a quarter interest in his stock holdings of the Gas Company and to the accumulations of dividends and other interests thereon claimed by Foss. On March 22, 1906, Doll filed his answer, admitting the material averments of the amended bill and also at the same time filed a cross-bill, seeking substantially the same relief prayed by Foss. On June 27, 1906, Doll filed an amended cross-bill. On August 12, 1905, the Gas Company filed a general demurrer to the amended bill of Foss, and on July 7, 1906, filed a general demurrer to the amended cross-bill of Doll. A hearing upon these demurrers resulted in their being sustained May 2, 1907, and on July 11, 1907, a decree was entered dismissing the amended bill of Foss and the amended cross-bill of Doll for want of equity. Both Foss and Doll prayed and were allowed separate appeals to this court from the decree last mentioned, but Foss alone perfected his appeal.

KNIGHT & HOYNE, FRANCIS W. WALKER, ROBERT F. PETTIBONE and FRED H. RAYMOND, for appellant.

An averment of an ultimate fact is sufficient to sustain a cause of action without the recitation of any fact to support such averment.

Gillett v. Robbins, 12 Wis. 329; Gage v. Kaufman, 133 U. S. 471; Ely v. New Mexico & Railroad Co., 129 U. S. 291; Bixler v. Summerfield, 195 Ill. 148; Dunbar

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v. Amer. Tel. Co., 224 Ill. 9; 3 Dan. Ch. Pr. (Perkins Ed.), 1947, 1958, 1963, 1972, 1979, 1988, 1990, 1997, 2019; 1 Dan. Ch. Pr. (Perkins Ed.) 367; Kantzler v. Bensinger, 214 Ill. 589; 21 En. Pl. & Pr. 719, note 1; 16 Cyc. 228, 229.

To make *laches* available as a defense on demurrer, the *laches* must appear on the face of the bill.

Kerfoot v. Billings, 160 Ill. 563; 16 Cyc. 268; People *ex rel.* v. Sterling Mfg. Co., 82 Ill. 457; Coquard v. National Linseed Oil Co., 171 Ill. 480; Higgins v. Lansingh, 154 Ill. 301; Beach v. Miller, 130 Ill. 162; Roseboom v. Whittaker, 132 Ill. 81; Atwater v. American Ex. Bank, 152 Ill. 605.

Where a dividend has been declared, a shareholder is entitled to an accounting in equity.

Cook County Brick Co. v. Kaehler, 83 Ill. App. 448.

SEARS, MEAGHER & WHITNEY, for appellee; JAMES F. MEAGHER and JESSE J. RICKS, of counsel.

An averment of ownership of stock which is not supported by a recitation of any fact tending to sustain the averment, is a conclusion of law and insufficient to support a cause of action.

Sterling Gas Co. v. Higby, 134 Ill. 557; Shickle v. Watts, 7 S. W. (Mo.) 274; Cook on Corporations, Par. 10; Kuhn v. The Academy of Music, 15 Weekly Notes Cases, 251; Travelers Insurance Co. v. Healey, 33 N. Y. Suppl. 911; McCloskey v. Barr, 38 Fed. 165; Savage v. Walshe, 26 Ala. 619; Thomas v. Desmond, 12 Howard Pract. 321; Plant v. Schuyler, 30 N. Y., Sup. Ct. R. 271; Thompson v. Cook, 21 Ia. 472; Poorman v. Mills, 35 Cal. 118; Miller v. Stalker, 158 Ill. 514; Becher v. Wells Flouring Mill Co. et al., 1 Fed. 276; Williamson v. Wager, 86 N. Y. Sup. 684; Allen v. Reilly, 15 Nev. 452; White v. Brown, 14 Howard Pract. 282; Encyc. Pleading & Pract., Vol. 12, p. 1020; Kilgore v. Ferguson, 77 Ill. 213; Garner v. McCullough, 48 Mo. 318.

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The relief sought by appellant should be denied on the ground of *laches* imputable from the fact of forty-eight years delay in asserting his claim, without reasonable excuse.

Kerfoot v. Billings, 160 Ill. 563; *In re* Severn & Wye and Severn Bridge Ry. Co., 1 Law Reports 1896, Chan. Div. 559; Smith v. Cork & Banden Ry. Co., Irish Repts., 5th Eq. Ser. 65; Winchester & Lexington T. Co. v. Wickliffe's Admr., (Ken.) 38 S. W. 866; Reynolds v. Summer, 126 Ill. 58; McDonald v. Stow, 109 Ill. 40; 19 Am. & Eng. Ency. of Law, 196; Codman v. Rogers, 27 Mass. 111; Shelburne v. Robinson, 8 Ill. 597; Thrall v. Mead's Estate, 40 Vt. 540; Palmer v. Palmer, 36 Mich. 487; Keithler v. Foster, 22 Ohio St. 27; Morrison v. Mullin, 34 Pa. St. 12; Jameson v. Jameson, 72 Mo. 640; A. T. & S. F. Ry. Co. v. Burlingame Township, 36 Kas. 628.

A stockholder's remedy to recover a dividend is at law and not in equity.

King v. Paterson, 29 N. J. Law, 504; Morawetz on Corporations, Par. 450; Coles v. Bank of England, 10 Ad. & El. 437; Bank of England v. Davis, 5 Barn & C., at p. 185; Hall v. The Rosehill & Evanston R. R. Co., 70 Ill. 673; Scott v. Central R. R. & Banking Co. of Georgia, 52 Barb., Sup. Ct. (N. Y.) 45; Stoddard v. Shetucket, 34 Conn. 542; Ellis v. Proprietors, 19 Mass. 243; Jackson's Admrs. v. Newark Plank Road Co., 31 N. J. Law, 277; Wheeler v. N. W. Sleigh Co., 39 Fed. 347; West Chester & P. R. R. Co. v. Jackson, 77 Pa. St. 321; Chaffee v. Rutland R. R. Co., 55 Vt. 110; Ford v. Easthampton Rubber Thread Co., 32 N. E. (Mass.) 1036; King v. Paterson and Hudson R. R. R. Co., 29 N. J. Law, 82; Gleason and Bailey Co. v. Hoffman, 168 Ill. 25; Badger v. McNamara, 123 Mass. 117; Beggs v. The Edison Elec. Light and Illuminating Co., (Ala.) 11 So. 381.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The claimed rights of Doll not being involved in this

record, with them we therefore have no concern.

Our opinion and discussion on the errors assigned will be restricted to three points: (1) The refusal of the chancellor to allow the motion by Foss to amend his amended bill; (2) the insufficiency of the allegation of ownership of stock, and (3) the doctrine of *laches* as applied to the averments of the bill.

First. The decision of the court upon the demurrers. was rendered May 2, 1907. Foss did not at this time move the court for leave to file an additional amendment. He allowed the matter to rest undisturbed until the entry of the final decree, more than two months thereafter. The contention of counsel that the Foss demurrer was heard without their being afforded an opportunity to present their client's cause, and that the hearing upon the demurrers was confined to the demurrer interposed to the amended cross-bill of Doll, is untenable and without force in the light of the record. Doll confessedly took whatever right he had after Foss filed his bill. The doctrine of *lis pendens* circumscribed Doll in his ability to prevail. Foss must first demonstrate that he had a cause of action before Doll could have any standing in virtue of his cross cause. Whatever rights Doll might have rested for their support upon the ability of Foss to maintain his cause. Doll had no rights independent of those of Foss. In the first instance, and as a preliminary to the right of either of them to prevail, the necessity arose for Foss to maintain that he was a stockholder as averred in his pleadings. Failing this, all of Doll's claims against the Gas Company disappear. The counsel of Foss were afforded ample opportunity to argue their cause; if they failed to avail of such opportunity when it offered, it is too late now to complain or seek any advantage or procure any indulgence because of such dereliction on their part. We are not able to believe that counsel for Foss were in any manner misled by the chancellor. Nothing appears in this record from which it can even be surmised that in the presen-

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tation of Doll's cause counsel for Foss were not fully aware that both demurrers were on hearing. In fact, the cause and cross cause are so interdependent one upon the other, that an argument as to the sufficiency of the cross cause, as stated in Doll's amended cross-bill, naturally involved a consideration of the Foss pleadings. Then, again, the record is contrary to the contention now made, which contention cannot prevail as against that record, which alike binds the parties and the court. The matter of allowing Foss to further amend his amended bill was addressed to the sound discretion of the chancellor. We are unable to say that a refusal to allow a further amendment on the motion made at the time of entering the final decree—a period of time exceeding two months from the rendering of the chancellor's decision upon the demurrer—was an abuse of such discretion, especially in view of the fact that the chancellor rendered his opinion in writing, which was made a part of the record and from which it clearly appears that the chancellor heard both demurrers and in that opinion expressly sustained both of them.

Second. The averment in the amended bill of Foss as to ownership of stock, is in these words: "that in or about the year 1857 he became, ever since has been and now is, a stockholder of the Peoples Gas Light & Coke Company, and the owner of 1500 shares, of the par value of fifty dollars * * * each, of the original capital stock of the said defendant corporation". This is obviously the conclusion of the pleader, without the statement of any fact from which the court can say, as a matter of law, that Foss at one time or at any time since 1857, was or is a shareholder of the Gas Company. Did Foss receive any certificate of stock of the Gas Company? And if so, was it acquired from the Gas Company or by assignment of a certificate or certificates owned by a third party? Has Foss ever been a shareholder, whose rights as such have received recognition by the Gas Company? Has he ever voted

at any stockholders' meeting the stock which he says he owns? There is no averment of any evidential fact supporting his claim, from which the court may be able to say, as a matter of law, that he is such owner. The cases are numerous, many of which are cited in the brief of counsel for the Gas Company, that an averment of an ultimate fact, without instance to support it, is but the conclusion of the pleader and insufficient to constitute a cause of action. The principle is well stated in Vol. 12, Ency. Plea. & Prac., 1020, thus: "To constitute good pleading the facts alone must be alleged. It is a general rule, which applies to all pleadings, whether at common law, in equity, or under the codes, that legal conclusions should not be pleaded, and that a bill, answer, complaint, declaration or other pleading is bad if it contains nothing more than bare averment of a legal conclusion". The averment of ownership of stock by Foss in his amended bill is a conclusion of law entirely unsupported by the recitation of any fact tending to support such conclusion. It is therefore insufficient to support a cause of action. Such defect in the pleading made it obnoxious to the general demurrer interposed to it. This was so decided in *Kilgore v. Ferguson*, 77 Ill. 213, where it is said: "A familiar elementary rule of pleading is that the facts only are to be stated, and no arguments or inferences, or matter of law. *Chitty Pl.*, 245. * * *

It is not enough to say the bond was good and sufficient. The existence of the facts should have been distinctly averred that make it good and sufficient. The question of whether it was good and sufficient is for the court and not for the plaintiff to determine. Unless by facts averred and proved it shall clearly be made to appear that the defendants have wilfully and corruptly injured the plaintiff * * * there can in no event be a recovery. The demurrer was properly sustained".

If Foss is entitled to any relief at all, it must arise from his being a *bona fide* stockholder in the Gas Com-

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pany. The averment in the bill in this regard is a mere conclusion, barren of any stated fact upon which it can rest for support; consequently the amended bill fails to state a cause of action.

Third. There are two averments in the amended bill of a demand made by Foss upon the Gas Company. One is a demand for an accounting, and the other concerns a demand for the examination of the books, records, etc., of the Gas Company. These averments are, first, "that before the commencement of this suit he demanded of the said defendant that it account with your orator", etc.; second, "and also before the commencement of this suit demanded of the defendant opportunity to examine the books", etc. These averments as to time are remarkably indefinite, not to say wholly unsatisfactory. Here was a lapse of forty-eight years between the time the claimed rights of Foss became vested, according to his contention, and his appeal to the law to enforce them. Did Foss rest as long before he demanded his rights of the Gas Company as he did in his appeal to the courts in an attempt to enforce them? In other words, when did he, during the running of these forty-eight years, make these demands upon the Gas Company? Of this the pleading of Foss affords no enlightening information. If any inference is permissible, about which we express no opinion, a date approximating that on which the bill was filed would do no violence to interpretation of these vague and uncertain averments. A failure to assert rights in varying periods of from three to forty years has in numerous cases in this state, under the doctrine of laches been held to be a complete defense to a suit in equity for relief. We, however, do not find any recorded case where a party applied to our courts for relief after sleeping upon his rights for so inexcusable a length of time as in the case at bar. We think the quotation from note to par. 965, Pomeroy's Equity Jurisprudence, third ed., p. 1788, appearing in appellee's brief, is forcefully ap-

plicable to the conditions of this case: "The doctrine concerning acquiescence from conduct and from lapse of time, is applied with special strictness in mercantile contracts, such as dealings with stock, subscriptions for shares and in agreements of a speculative nature". The mutations of time bring about many changes in physical conditions. It is plain from the statements in Foss' amended bill that during nearly a half a century of somnolence upon his part, the Gas Company has experienced many changes. Its capital stock has been increased from half a million of dollars to thirty-five millions of dollars. The franchises and rights of eight other gas companies have been taken over, either by way of merger or by acquisition of the right to operate their several plants. No obstacle to the asserting of any of Foss' claimed rights appears from any averment of his amended bill. No excuse for not sooner asserting his rights and enforcing his claim is disclosed. But Foss proceeds upon the theory that the Gas Company, as to dividends, is a trustee of the stockholder, and that the doctrine of laches is inapplicable because limitation statutes have no application between trustee and *cestui que trust*, and in support quote from 10 C. Y. C., 506, that "dividends declared upon the capital stock of a corporation and payable on demand are not subject to the running of prescription or limitation until there has been a demand and refusal". Whatever may be the rule in other jurisdictions, such is not the doctrine in this state. The relationship of the stockholder and the corporation as to dividends declared is not that of trustee and *cestui que trust*. At the most there is but an implied trust in the corporation as to such dividends. As to implied trusts, the doctrine of laches and the Statutes of Limitations are, in this forum, invokable as a defense. Such in effect is Reynolds v. Summers, 126 Ill. 55, where the court say: "In respect of resulting or implied trusts, laches or the Statute of Limitations may constitute a bar to the action.

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Such trusts may be barred by the mere lapse of time." McDonald v. Stow, 109 *ibid.* 40.

The application of the doctrine of laches or the bar of the Statute of Limitations as a defense by a corporation to dividends declared upon its stock, involves the further question of demand. But the law will no more sanction inexcusable delay in making a demand for such dividends than it will tolerate laches in asserting a claim in a forum of competent jurisdiction. Such dividends being payable upon demand, the Statute of Limitations will not commence to run until after a demand is made. But there is of necessity a limitation to the right to make such demand, for, as said in Codman v. Rogers, 27 Mass. 111: "A party must not be permitted to sleep over his rights to the prejudice of the party on whom he makes a claim. * * * A demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity".

As to what may be considered a reasonable time, the court in case *supra* say: "What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule. It would depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action, and in both cases the same presumptions arise from delay. In the present case the plaintiff, by his own showing, is chargeable with great laches. He has lain by for seventeen years without making any claim. * * * No sufficient reason is suggested in the bill for this long delay; and to decree an account under such circumstances would be a most dangerous precedent, against public policy and the principles and rules of equity".

The force of this reasoning is thrice accentuated in its application to the half century of inactivity of Foss

in making demand or the asserting by him of any right against the Gas Company during that time. In the absence of any pretense of an excuse for such protracted delay in the assertion of rights which have, during this time, grown from a claimed stock interest of \$75,000, to the claim of stock interest now aggregating the enormous sum of \$5,250,000, it would certainly be unprecedented to hold that this action can be maintained. It would seem that if a case can be conceived, of the nature of the one at bar, where the doctrine of laches and the bar of the Statute of Limitations are invokable under the facts appearing upon the face of the bill, that this case is its most extreme example. During this nearly half century of time, many persons, we may assume, actively engaged in the business of the Gas Company and intimately acquainted with its affairs, have passed on to another life—persons who, in all probability, could have satisfactorily explained the whole transactions here involved. The unprecedentedly long delay in the assertion of the rights now claimed can only reasonably be accounted for upon the theory that Foss was waiting for the death of all persons who could shed any explanatory light upon his claim, leaving himself as the last survivor—a witness whose testimony could not be contradicted or refuted. Statutes of Limitation are statutes of repose. It is the policy of the law that there should be some fixed time within which rights may be asserted and enforced, and after which time they should be forever barred. *Winchester v. Wickliffe's Admr.*, 38 S. W. R. 866.

We think it beyond dispute that laches is plainly apparent upon the face of the bill, and that there is no statement of any facts or circumstance either explaining or excusing such laches; and as in *Kerfoot v. Billings*, 160 Ill. 563, such laches may be urged as a defense in bar of the action under a general demurrer.

The Supreme Court in *Wilcoxon v. Wilcoxon*, 230 Ill. 93, announces a doctrine which by analogy is pertinent to the pleading here under discussion. The

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court say: "It is one of the fixed doctrines of courts of equity that nothing can call forth this court into activity but conscience, good faith and reasonable diligence, and the absence of any of these elements is equally fatal to a recovery, whether they appear in a cross-bill or in an original bill."

In the Wilcoxon case *supra* the relief sought was denied on the express ground of laches imputable from the fact of fifteen years' delay in asserting the claim, without reasonable excuse.

The doctrine that a corporation is a trustee for a stockholder as to dividends declared, does not prevail either in England or in Illinois. *In re Severn & Wye & Severn Bridge Railway Co.*, 1 Law Reports, C. D. 559, (1896); *Smith v. Cork & Brandon Ry. Co.*, 5 Eq. Series Irish Reports, 65.

In Illinois the trust, if any, is one implied from the relationship of the parties and under decisions already cited both the doctrine of laches and the bar of the Statute of Limitations are invokable as a complete defense, and such defense may be raised by general demurrer wherever such laches or the bar of the statute appears upon the face of the pleading to which such general demurrer is interposed.

The decree of the Circuit Court, being without error, is affirmed.

Affirmed.

**Terra Del Whipple, Appellee, v. John A. Whipple,
Appellant.**

Gen. Nos. 14,060 and 14,061.

1. AMENDMENTS AND JEOPAILS—*when verification of amendment of sworn pleading not essential.* Verification of an amendment to a sworn pleading is not essential where there is no fact alleged in the amendment calling for verification.

2. **ALIMONY**—*what questions cannot be determined upon application for.* The merits of the main relief sought cannot be determined upon the application for the allowance of alimony *pendente lite*.

3. **SOLICITOR'S FEES**—*when allowance to wife properly subject to revision.* If an allowance of solicitor's fees has been made to a wife to enable her to defend against an appeal by her husband questioning an allowance of alimony *pendente lite*, and if such allowance is not employed for such purpose, it is proper for the chancellor to modify his order with respect thereto.

Divorce. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

JULIAN C. RYER, for appellant.

No appearance by appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

These two causes were consolidated for hearing upon the same briefs and abstracts.

Appellee has not appeared or submitted any arguments in defense of these appeals.

Terra Del Whipple filed her bill against her husband, John A. Whipple, for separate maintenance, charging as grounds extreme and repeated cruelty upon the part of her husband toward her. This bill was duly verified with the oath of appellee. The bill was subsequently amended, changing the prayer thereof from separate maintenance to divorce. The amendment was not verified. Verification was not necessary, as there was no fact alleged in the amendment calling for verification. The change injected by the amendment concerned the nature of the relief asked upon the identical facts averred in the original bill.

Appellant first demurred to the bill as amended, and upon the overruling of his demurrer answered, denying the truth of the material averments and injecting counter charges impugning the moral conduct of appellee during her married life.

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The facts alleged in the bill if sustained by proof, are, in our opinion, *prima facie* sufficient to entitle appellee to the divorce prayed in the amendment filed. On motion of appellee for alimony *pendente lite* and an allowance for solicitor's fees to enable her to prosecute her suit for divorce, the chancellor, on April 1, 1907, upon affidavits submitted by both parties, granted an allowance to appellee of \$10 a week for alimony *pendente lite* and \$40 for solicitor's fees.

On May 20, 1907, appellant having theretofore prayed an appeal to this court from the order of April 1, 1907, granting alimony and solicitor's fees, the chancellor, upon the petition of appellee duly verified, and on sundry affidavits submitted by both the parties, entered an order making an additional allowance of \$95 for solicitor's fees to enable appellee to defend against the appeal of appellant to this court from the order of April 1, 1907. From the order of May 20, 1907, appellant prayed for, was allowed and perfected an appeal to this court. The appeals now before us involve the legal integrity of these two orders.

As the learned chancellor did in the court below, so we have done on this review—examined with painstaking care all the affidavits submitted by the several parties which appear in the record before us, and after so doing our minds are attuned to that of the chancellor, made evident when he said in rendering his judgment, “If defendant's version is true, complainant should not have any alimony or solicitor's fees, but it is impossible for the court, in view of the conflict here, to determine that matter on affidavits”. The merits of the controversy between the parties cannot be determined on a motion for temporary alimony. *Burgess v. Burgess*, 25 Ill. App. 525.

Allowance of temporary alimony and solicitor's fees in divorce cases is discretionary with the chancellor, and the court of review will not go into the merits of

the divorce suit upon an appeal from an order awarding temporary alimony. *Lind v. Lind*, 37 *ibid.* 178.

The affidavits considered, the award made is reasonable and within the apparent ability of appellant to pay.

Section 15, chap. 40, R. S., title "Divorce", provides *inter alia* that "in case of appeal or writ of error by the husband, the court in which the decree or order is rendered may grant and enforce the payment of such money for her defense and such equitable alimony during the pendency of the appeal or writ of error as to such court shall seem reasonable and proper".

In construing this statute it was held in *Jenkins v. Jenkins*, 91 Ill. 167, that the Circuit Court may make an order for solicitor's fees after the perfecting of an appeal.

While the order of the chancellor allowing appellee solicitor's fees to enable her to defend against this appeal was without error at the time it was made, and as our review is circumscribed to the condition environing the parties and their legal rights as they existed at the time of the entry of the order, we are not permitted to adjudge the appeal upon conditions subsequently arising; yet we deem it but just and equitable to state that appellee has not appeared in this appeal and consequently has not incurred any liability for the solicitor's fees so allowed her. It will therefore be conscionable for the chancellor to make such further order touching the allowance of May 20, 1907, as the law may permit and the rights of the parties require, for it is evident that appellee has not assumed the burden or incurred the liability which the \$95 allowance was made to enable her to discharge.

The orders appealed from, of April 1, and May 20, 1907, are both affirmed.

Affirmed.

William Steinhaus, Defendant in Error, v. Emil Radtke, Plaintiff in Error.**Gen. No. 14,069.**

1. **VERDICT**—*what does not establish preponderance of evidence.* A preponderance of the evidence does not necessarily lie with the side producing upon a given fact or set of facts the greater number of witnesses.

2. **TORTS**—*liability of tort-feasor.* Tort-feasors are jointly and severally liable; they may be proceeded against, one without the other, at the election of the injured party. The party so selected must respond to the full measure of damages suffered by the injured party as the result of the tort committed by both wrong-doers.

3. **VARIANCE**—*when objection comes too late.* An objection of variance comes too late when first made on appeal.

TRESPASS. Error to the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1907. **Affirmed.** Opinion filed December 7, 1908.

JOHN STELKE, for plaintiff in error; JAMES D. POWER, of counsel.

UTT BROS. and LYNN, HOUSE & ROE, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

In a trial before the Circuit Court and a jury the plaintiff, William Steinhaus, obtained a verdict of \$2,250 in an action against defendant, Emil Radtke, for an assault and battery upon him. Plaintiff remitted \$750 from the verdict, whereupon the trial court overruled the pending motion for a new trial and gave judgment upon the verdict—less the amount of the *remittitur*—for \$1,500, and defendant appeals to this court seeking a reversal of this judgment.

No complaints are made touching the pleadings or the rulings of the trial judge upon the evidence, nor is it claimed that the damages awarded are excessive,

but the errors assigned and argued are that the verdict and judgment are contrary to the manifest weight of the evidence, and that the trial court erred in giving instructions 2, 3 and 4, requested by plaintiff, and in failing to give instruction 1 proffered by defendant.

Plaintiff claimed, and produced witnesses whose testimony tended to sustain his claim, that defendant knocked him down by striking him in the back of the head or neck, and that while he was falling defendant kicked him in the left side above the groin; that after so maltreating plaintiff, defendant called upon his brother, Theodore, to strike plaintiff, and that responding to such request, Theodore struck plaintiff in the face. Twelve witnesses were sworn and testified, five of these sustaining plaintiff's theory and seven of them in contradiction of it. A careful reading of the evidence impresses us with the extremity of its conflict. It is hopelessly irreconcilable on the assumption that all of the witnesses are equally worthy of belief. The credibility of the several witnesses was for the jury to determine. Their appearance upon the witness stand, their manner in giving their evidence, were matters peculiarly within the province of the jury, because they saw and observed the witnesses during all the time of their giving their testimony—a privilege denied us. Numbers do not necessarily establish preponderance. It often happens that the lesser number prove the most trustworthy and credible, and that when their testimony is analyzed and sifted with that of the greater number, the preponderance of the proof is found to arise from the evidence of the minor number. All the evidence considered, we are unable to say that the finding of the jury is manifestly contrary to its greater weight. The jury have reconciled the conflict. With their conclusion we rest content.

There is no vice in instruction 2. It states a correct principle of law applicable to the facts in evidence. There is no rule for contribution among wrong-doers.

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Two persons guilty of an assault, or any other tort, need not be sued jointly. They may be proceeded against, one without the other, at the election of the injured party. The party so selected must respond to the full measure of damages suffered by the injured party as the result of the tort committed by both wrong-doers. *Barnes v. Gray*, 5 H. & J. (Md.), 436; *W. C. St. Ry. v. Feldstein*, 69 Ill. App. 36.

Such being the law, it follows that the court properly refused to give defendant's proffered instruction 1, as the statement of the law in that instruction was in direct conflict with the rule above announced.

Instruction Nos. 3 and 4 are equally vulnerable against objection. They state the law and were followed by similar instructions, in slightly amplified form, given at the request of the defendant.

Some argument is made upon a claim that there is a variance between the averments of the declaration and the proof. Suffice it to say that we observe no variance of an appreciable nature, and moreover the objection as to a variance, if one existed, not having been made in the trial court, comes too late when made here for the first time.

We are satisfied that the record is free from reversible error, and the judgment of the Circuit Court is affirmed.

Affirmed.

John A. Tolman & Company, Appellant, v. City of Chicago et al., Appellees.

Gen. No. 14,073.

1. PUBLIC STREETS—*what use of, unlawful.* The maintenance by a private corporation of an obstructing nuisance upon a public street is unlawful and may properly be removed by the municipality.

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2. NUISANCE—*what is, as matter of law.* Barrier platforms and skids constructed upon a public street impeding the movements of pedestrians are by statute a public nuisance.

3. NUISANCE—*rights of municipality with respect to.* A municipality may proceed to abate a public nuisance and prosecute for fines for their maintenance, the one or the other, or both, in its discretion but it is not required to proceed to penalize as a condition precedent to the right to abate.

4. NUISANCE—*what does not preclude municipality from right to abate.* Acquiescence in the maintenance of a public nuisance or purpresture does not estop a municipality to abate the same.

Bill for injunction. Appeal from the Superior Court of Cook county; the Hon. WILLARD M. McEWEN, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 7, 1908.

Statement by the Court. It appears from the averments of the bill in the record that appellant is a domestic corporation, engaged in the business of a wholesale grocer, and in that business buys, sells and manufactures food products, such as spices, etc.; that such business has been conducted on a large scale continuously since the year 1885, with success and profit; that it employs in the vicinity of 200 persons, and that the ramifications of its business extend to the States of Wisconsin, Michigan, Iowa, Minnesota, Ohio and Kansas; that its main place of business is in Chicago, and that it occupies as tenant from year to year a five-story brick building situate on the southwest corner of Michigan avenue and Lake street and numbered 59 to 71 Michigan avenue and 4 to 8 Lake street; that in the necessary conduct of such business somewhere in the vicinity of 200 tons of merchandise is received into and discharged from its place of business every working day, by means of twenty single and double teams and wagons; that there are means of ingress and egress to the Michigan avenue and Lake street building from both the avenue and street fronts and by means of an alley twenty-three feet in width running north and south on the west side of the building; that it would be practically impossible for appellant to conduct its

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business without using certain mechanical appliances and maintaining a permanent platform and a temporary skid-way as a means of loading and unloading wagons at the street with goods and merchandise from and to its place of business; that at the Michigan avenue and Lake street openings of the building a platform of four feet is maintained at a height of about eighteen inches above the sidewalk and on a line with the first or shipping floor of the building; that skids in connection with these platforms are maintained to connect the platform with the end of the merchandise wagons when backed up at the street curb; that these skids are constructed of planks about eight feet long, one foot wide, and of a thickness of one and one-half inches, and when in use run from the platform in front of the shipping room to the rear end of the wagon in process of loading or unloading. The platform is a permanent structure with two iron steps at each end for foot passengers to use in mounting to and descending from the platform to the sidewalk. The skids are movable and are in use much of the time during business hours. It is said that when the skids are not in actual use they do not encumber the sidewalk, but leave that part of the walk in front of the raised platform free for use by pedestrians. It is charged that the platform and skid method of getting goods to and from appellant's building is that which obtains by all the wholesale houses in the neighborhood of appellant, and that such method has been in vogue for more than thirty years, with the knowledge of the city, and without any disturbance on its part prior to the attempt on the part of the city to do those things which the bill seeks to enjoin. The neighborhood, it is said, is congested with traffic and is in the vicinity of the freight warehouses and yards of several railroads; that neither the platform nor skids are a nuisance or create a purpresture, and are not in violation of the common law or any statute of this State or any ordinance of the city of Chicago; that the city authorities threaten to prevent appellant from

using the skids or maintaining the platforms, and that to do so will be unjust, oppressive and unreasonable, and if the city is successful in so doing, will result in irreparable injury and loss to appellant; prays for an injunction to arrest the city in its design to interfere with appellant's skids and platform, etc. A temporary restraining order was entered upon the *ex parte* application of appellant upon the recommendation of a master after reading the bill.

The city and all of the defendants filed a joint and several answer, which sets up *inter alia* that Lake street and Michigan avenue are public streets, controlled solely by the city, and that the city is required, in the exercise of such control, to see to it that these streets shall at all times be open for public travel throughout their entire length and width; that the platforms and skids are a barrier to such free and uninterrupted use of the sidewalks of said streets fronting appellant's premises, and constitute purprestures and nuisances; that the maintenance of said platforms and skids are without authority, and that it is the duty of the city to remove them and keep the streets open for travel by the public, unobstructed.

The cause was tried before the chancellor upon the bill and answer above recited and replication of appellant to the answer, and an agreed statement of facts, with some enlightening photographs showing appellant's place of business in operation with and without the skids in use. The statement of facts in its most material parts, as applied to the rights of the parties, is as follows:

"That on the Michigan avenue side of the premises of complainant, the skids are in use, on each average working day, an average of two hours and fifteen minutes and principally between the hours of 9 o'clock A. M. and 4 o'clock P. M. That the greatest public travel on said Michigan avenue and said East Lake street on each average working day is between the following hours: 6 to 8 o'clock A. M., 12 o'clock noon to 1

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o'clock P. M., and 5 to 6 o'clock P. M. 'That the average number of pedestrians traveling along said Michigan avenue in either direction on the sidewalk immediately abutting the premises of the complainant each working day between the hours of 6 o'clock A. M. and 6 o'clock P. M. is 2,415 persons. That the average number of persons passing each average working day when the skids are in use and traveling along said sidewalk and passing over and along the platform provided for pedestrians when skids are in use is 536 persons. That on the Lake street side of the premises the skids are in use each average working day three hours and nineteen minutes, and principally between the hours of 8 o'clock A. M. and 4:30 o'clock P. M. That the average number of pedestrians passing along the Lake street side of said premises between the hours of 6 o'clock A. M. and 6 o'clock P. M. is 1,912. That when the skids are in use on the Lake street side of the premises of the complainant, about 453 persons pass along and over the platform provided for them adjoining the shipping platform of the complainant each average working day.'"

The chancellor, upon the hearing, dissolved the temporary injunction and dismissed the bill for want of equity, and appellant appeals.

ALBERT KOCOUREK and ASHCRAFT & ASHCRAFT, for appellant; RAYMOND M. ASHCRAFT, of counsel.

WILLIAM D. BARGE and GEORGE W. MILLER, for appellees; EDWARD J. BRUNDAGE, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

We think the learned counsel for appellant have misconceived the controlling principle of the case at bar, and have argued their client's case ingeniously from an erroneous view point. Their arguments would be very convincing were they applicable to the cause argued. The questions do not rest in the solution of

the proposition that the use of the skids is not *per se* a nuisance, but whether or not the maintaining of the permanent platforms and the operation of the skids in conjunction therewith, across the public highway, so interferes with the permanent right of the public to the unimpeded and unobstructed use of every part of the public walk in front of appellant's building and place of business, as to constitute a nuisance in fact. From the photographs in the record, it is plainly seen that the movements of pedestrians are greatly impeded by the barrier platforms and skids there appearing in the street on both the Michigan avenue and Lake street fronts of the business premises of appellant, and that when these skids are in use pedestrians encounter obstructions which materially impede their progress. That such obstructions are nuisances, are not matters resting on judicial interpretation from the facts. They have been so designated by the law-making power of the state. Section 221, div. 5, chap. 38, R. S., which reads that "It is a public nuisance," among other things, "to obstruct or encroach upon public highways, private ways, streets, alleys, commons," etc. By par. 75, sec. 62, art. 5, chap. 24 R. S., it is enacted that the city council shall have power to declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist".

This vests in the city dual powers, both to abate nuisances and to penalize the parties responsible for their existence. The city may proceed to abate and prosecute for fines the one or the other, or both, in its discretion, but it is not required to proceed to penalize as a condition precedent to the right to abate.

It is again insisted that the city has recognized the right to maintain the platforms and skids by long acquiescence, but it is a sufficient answer to this to say that the city has no legal right or power to consent to the continued existence of a purpresture or to any condition which operates to deny to the public the free

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and untrammelled use of any part of the public highway. It is conceded by the stipulation of facts that those portions of the streets obstructed by appellant with its platforms and skids are a part of the public highway. The court say in *Smith v. McDowell*, 148 Ill. 51, that "the permanent encroachment upon a public highway or street, unauthorized by the legislature, and the creation of a perpesture therein which obstructs the free and uninterrupted passage of the public is, as a matter of law, a public nuisance. The matter of inconvenience to the public, or that sufficient of the street may remain unobstructed to still accommodate the public travel, cannot be considered".

In *Hibbard v. Chicago*, 173 Ill. 91, it was sought to enjoin the city from tearing down an awning or shed which had been constructed over a public walk, in virtue of a license given by the city, and the court said: "The mere consent of the city council by resolution or order gives no vested right. * * * The averment that the awning so erected does not injure or obstruct any person does not change the case. The sole question to be determined is, is it an encroachment on the street of the City, and if so, it is a purpresture".

The case of *People v. Harris*, 203 Ill. 272, involved the maintaining of a bay window erected by authority of an order of the city council. The court criticised and condemned this order as being without authority of law, and said "that there is no safe field of speculation other than to keep within the limits placed by the books, by saying that the streets in their entirety are public properties exclusively for public use, and that they or any part of them cannot be devoted exclusively to private purposes or private use". The rule of law controlling the public highway is that they are for their whole width and length held for the exclusive use of the public, and that the municipal authorities can grant no right or easement, not of a public nature, and that the street in its entirety must be maintained for public use, and that all private encroachments

thereon, from whatever source they may emanate, are unlawful. *Field v. Barling*, 149 Ill. 556; *Pennsylvania v. Chicago*, 181 *ibid.* 289; *Chicago Cold Storage, etc. v. People*, 224 *ibid.* 287.

In discussing the ordinance of the city council, in virtue of which the platform in question was built in the last case cited, the court say: "While the ordinance provides that the sidewalk may be used for public purposes, yet in order to use it those passing over it must go up and down five or six steps at either end. If it is not a nuisance and an obstruction, then the city might authorize private parties to erect and maintain bulkheads in every street of the city of any height. Public streets and sidewalks cannot be lawfully used for any such purpose. We are of the opinion that the platform in question was a nuisance and such an obstruction to public travel as entitled appellees to have it removed".

We think the foregoing expressions of opinion by the Supreme Court are decisive of the rights of appellant, that the difference between these cases and the case at bar is simply one of degree, and that the obstructions in question here fall under the ban of the law, and that the city of Chicago, through its accredited officials, has the right to abate the nuisance thus created, by removing the purpresture constituting the nuisance. It is the duty of the city to see that the streets remain unobstructed, free and untrammelled for public use, and to remove all obstacles which stand in the way of such free enjoyment by the public.

The decree of the Superior Court dissolving the temporary injunction and dismissing appellant's bill for want of equity, being right, is affirmed.

Affirmed.

John Kulpinsky, Plaintiff in Error, v. Marshall E. Sampsell et al., Defendants in Error.**Gen. No. 14,205.**

1. **APPEALS AND ERRORS**—*when exception not essential to preserve ruling for review.* The Appellate Court will consider rulings with respect to instructions even though the bill of exceptions shows no exception to the ruling of a motion for a new trial.

2. **PASSENGER AND CARRIER**—*when existence of relation essential to recovery.* The following instruction held properly given in this case:

"The court instructs the jury that the plaintiff has alleged in his declaration that at the time and place in question he was a passenger on said car. This is a material allegation of said declaration and the burden of proof is upon the plaintiff and he must prove said allegation by a preponderance or greater weight of the evidence before he can recover in this case. If you find from the evidence, under the instructions of the court, that the plaintiff has failed to prove by a preponderance or greater weight of the evidence that at the time and place in question the plaintiff was a passenger on said car, then the plaintiff cannot recover and you should find the defendants not guilty."

Morris v. Chicago Union Traction Co., 119 Ill. App. 527, distinguished.

3. **ASSAULT**—*when instruction as to liability of carrier for, appropriate; when not.* An instruction as follows held properly given:

"If you find from the evidence that the plaintiff, at the time of the accident was stealing a ride on defendants' car, your verdict must be guilty."

Held, further, an instruction as follows properly refused:

"The court instructs the jury that although you may believe and find from the evidence under the instructions of the court that the plaintiff got on the step of the east-bound car with the intention of 'flipping' the car or with the intention of stealing a ride and of not paying his fare, yet this fact alone, if it was a fact, would not justify the conductor in kicking the plaintiff, if he did kick him; and if you find from the evidence that the conductor in charge of the east-bound car kicked plaintiff and that such act on the part of the conductor was wilfully committed and that by reason thereof plaintiff was struck by defendants' west-bound car and thereby injured as charged in the declaration, or either count thereof, you may find the defendants guilty."

The holdings being predicated upon the proposition that the declaration relied solely upon the existence of the relation of passenger and carrier between the plaintiff and defendant.

Action in case for personal injuries. Error to the Superior Court of Cook county; the Hon. GEORGE A. DUPUY, Judge, presiding.

Heard in the Branch Appellate Court at the March term, 1908.
Affirmed. Opinion filed December 18, 1908.

JOHN F. WATERS, for plaintiff in error; JOEL BAKER,
of counsel.

JOHN A. ROSE and FRANK L. KRIETE, for defendants
in error; W. W. GURLEY, of counsel.

MR. PRESIDING JUSTICE SMITH delivered the opinion
of the court.

Plaintiff in error, plaintiff below, was injured April 19, 1904. He ran after and overtook a street car on Randolph street in the city of Chicago, which was being operated by defendants in error, as receivers. Plaintiff in error boarded the car, on what is known as the blind side of the car, by going upon the step of the rear platform, which was separated from the platform by a vestibule door. He intended to ride there, as he claimed, only until the car should come to a stop, and thus afford him an opportunity to enter the car. After he had ridden on the step a short distance, variously estimated from 150 to 300 feet, and while the car was going at a rate of eight or ten miles an hour, it is claimed that the conductor of the car came to the vestibule door and opening it kicked plaintiff in error in the stomach. Plaintiff in error swayed outwardly from the car, and another car passing in the opposite direction struck him and knocked him off the car, and he received the injuries for which he brought an action for damages.

On the trial the jury returned a verdict for the defendants and judgment was entered on the verdict, on February 10, 1906.

On March 3, 1906, that being the last day of the term, a motion was entered to vacate and set aside the order overruling the motion for new trial and the judgment, and this motion was continued for hearing and disposition to the March term 1906. On June 1, 1907, the order overruling the motion for a new trial and enter-

ing judgment for defendant entered on February 10, 1906, was vacated; and thereupon, as the record shows, the plaintiff "enters herein his motion for a new trial in said cause and said motion coming on to be heard for a new trial herein, after arguments of counsel and due deliberation by the court, said motion is overruled", and the usual judgment order was thereupon entered.

The errors relied upon in argument for a reversal of the judgment relate to certain instructions given by the court at the instance of defendants in error. Defendants in error contend that we cannot consider these assignments of error for the reason that the bill of exceptions does not show any exception was preserved to the order of June 1, 1907, overruling the motion for a new trial, and cite *East St. L. Elec. R. R. Co. v. Cauley*, 148 Ill. 490; *Johnson v. Farrell*, 215 *id.* 542, and other cases in support of their contention. These cases state the rule of practice in this state at the time the briefs of defendants in error were prepared and filed, and until the rule was changed by *Yarber v. Chicago & Alton Ry. Co.*, 235 Ill. 590, 597, where the cases announcing the rule of practice invoked by defendant in error are expressly overruled; and we think *Johnson v. Farrell*, *supra*, though not mentioned in the opinion, must also be considered as overruled as to this point.

The record in this case shows that exceptions were taken and preserved in the bill of exceptions to the instructions of the court requested by the defendant in error, and under the rule in the *Yarber* case *supra*, the instructions are before us for consideration.

The court gave the following instruction at the request of defendants in error:

"The court instructs the jury that the plaintiff has alleged in his declaration that at the time and place in question he was a passenger on said car. This is a material allegation of said declaration and the burden of proof is upon the plaintiff and he must prove said

allegation by a preponderance or greater weight of the evidence before he can recover in this case. If you find from the evidence, under the instructions of the court, that the plaintiff has failed to prove by a preponderance or greater weight of the evidence that at the time and place in question the plaintiff was a passenger on said car, then the plaintiff cannot recover and you should find the defendants not guilty”.

Plaintiff in error contends that the court erred in giving this instruction, and cites *Morris v. Chicago Union Trac. Co.*, 119 Ill. App. 527, where the giving of this instruction was held to be error as applied to the facts of that case. This court in that case, at page 529 in the statement of facts preceding the opinion, called special attention to the fact that after the plaintiff was knocked to the ground and was unconscious, the servants in charge of the following car negligently failed to look ahead and neglected to use proper efforts to stop said car. There was no averment in the declaration in that case that the plaintiff was a passenger upon the following car, nor was there any proof to that effect. The instruction did not apply to either the allegations or the evidence. That case and the authorities there cited are authorities for the proposition that if the averments of the declaration are divisible, the plaintiff may prove so much of his averments as make out a case. In the case before us it is distinctly averred in each count that the assault was made upon the plaintiff in error while he was a passenger, thus stating the relationship of the parties at the time to be that of carrier and passenger, which raises the high degree of obligation resting upon the carrier of passengers that the law implies in such cases. In our opinion the instruction was applicable to this case and the court did not err in giving it.

It is contended that the court erred in giving the following instruction: “If you find from the evidence that the plaintiff, at the time of the accident, was stealing a ride on defendants’ car, your verdict must be

not guilty"; and in refusing the following instruction requested by the plaintiff:

"The court instructs the jury that although you may believe and find from the evidence under the instructions of the court that the plaintiff, John Kulpinski, got on the step of the east-bound car with the intention of 'flipping' the car or with the intention of stealing a ride and of not paying his fare, yet this fact alone, if it was a fact, would not justify the conductor in kicking the plaintiff, if he did kick him; and if you find from the evidence that the conductor in charge of the east-bound car kicked plaintiff and that such act on the part of the conductor was wilfully committed and that by reason thereof plaintiff was struck by defendant's west-bound car and thereby injured as charged in the declaration, or either count thereof, you may find the defendants guilty."

The rulings of the court upon these instructions present the question whether under the averments of the declaration and the evidence plaintiff is entitled to recover.

The theory of each count of the declaration, as we have previously stated, is that plaintiff became a passenger on the car, and while he was such passenger, the conductor of the car wilfully and wantonly assaulted and kicked the plaintiff and ejected him from the car, whereby he was struck by another car operated by the defendants going in an opposite direction and was injured.

The rule that a plaintiff cannot make one case in his pleadings and recover on another case made by his proof is too well settled to admit of question or argument. The evidence shows beyond controversy that plaintiff was not a passenger. He was stealing a ride on defendants' car, and had no intention of becoming a passenger. The evidence shows, we think, that plaintiff was a trespasser, and that the assault of the conductor was made while plaintiff was in the act of trespassing upon the car.

In our opinion plaintiff was not entitled to submit

a case under his declaration involving a wilful and wanton assault, by the conductor of the car acting within the scope of his authority, upon the plaintiff while he was a trespasser. This is in substance the ruling of the trial court in the instructions above quoted, and we find no error in the ruling.

Error is also assigned upon the giving of an instruction to the effect that the jury should not allow anything for mental impairment, for the reason that the declaration makes no claim for mental impairment. In view of what we have already said that no recovery can be had in this case, under the averments of the declaration, it is unnecessary for us to consider this instruction. The giving of it did not and could not affect plaintiff's case injuriously. It is likewise; and for the same reason, unnecessary for us to consider the exclusion of evidence relating to plaintiff's mental impairment.

Finding no material error in the record, the judgment of the Superior Court is affirmed.

Affirmed.

Georgie Clifford, Defendant in Error, v. James E. Stafford, Plaintiff in Error.

Gen. No. 14,224.

1. **BAILMENTS**—*when relation of inn-keeper and guest does not arise.* One who engages a room for a limited period, as for a week, with the owner who runs separately a restaurant, does not become a guest within the meaning of the law.

2. **BAILMENTS**—*obligations of lodging-house keeper.* A lodging-house keeper is under no duty in any way to care for the safety of the goods and property of his lodger.

Action of contract. Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Reversed with finding of facts. Opinion filed December 18, 1908.

Clifford v. Stafford, 145 App. 247.

C. VAN ALLEN SMITH, for plaintiff in error.

ADOLPH MARKS, for defendant in error.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

This writ of error brings before us for review the record in an action in the Municipal Court of Chicago, instituted by defendant in error against plaintiff in error to recover the value of a silk dress claimed by the plaintiff below to have been taken from her room in the Commercial European Hotel in Chicago while she was there a guest. The cause was tried before the presiding judge without a jury and resulted in a judgment for the plaintiff for \$50.

One Bessie Baker at the same time began a similar action against plaintiff in error in the same court to recover the value of a plume claimed by her to have been taken from the same room. The cases were tried together in the Municipal Court by agreement of counsel and judgment was rendered in favor of Bessie Baker for \$20 against plaintiff in error.

There is no controversy of fact in the records. The two plaintiffs rented room 157 of the Commercial European Hotel for the definite period of one week, for which they agreed to pay at the end of the week five dollars, and they did pay five dollars for the room when they surrendered it. The defendant, Stafford, conducted a restaurant which was run separately, where meals were served to lodgers in the hotel and others, but the contract covered the room simply, and did not include meals in the restaurant.

The evidence tends to show that Georgie Clifford, while occupying the room, lost a silk dress which was taken from the room, and that Bessie Baker lost a plume, while they were occupying the room, and that the plume was taken from the room.

The question presented by the assignments of error, and by the briefs of the parties, is whether, when the

property was lost the relation of inn-keeper and guest existed between the parties so as to make the plaintiff in error liable for its loss.

In our opinion the point upon which the question of liability turns is the fact that a specific agreement was made between the parties for the room for a definite term at a price named. Whatever the plaintiff in error's relations may have been to travelers who came to his hotel for lodging and entertainment for no definite time or price but for a reasonable consideration, under the contract made between the parties in this case, defendant in error became a mere lodger, and the plaintiff in error was a keeper of a lodging house, and was under no duty to care in any way for the safety of the goods and property of defendant in error. Beale on Inn-keepers & Hotels, Sec. 331; Stewart v. McCready, 24 How. Pr. 62; Shoecraft v. Bailey, 25 Ia. 553; Pullman Palace Car Co. v. Smith, 73 Ill. 365; Bailey v. The People, 190 *id.* 34; Vigeant v. Nelson, 140 Ill. App. 644, and cases there cited.

If the plaintiff in error was under no duty to care in any way for the safety of the goods and property of defendant in error, then no duty was violated by plaintiff in error, and there was and is no liability shown by the evidence. The judgment is therefore reversed with a finding of facts.

Reversed with a finding of facts.

Cora M. Langan, Defendant in Error, v. Chicago City Railway Company, Plaintiff in Error.

Gen. No. 14,230.

1. INSTRUCTIONS—*when as to preponderance of evidence erroneous beyond cure.* An instruction which tells the jury that they "are not to be supposed, furthermore, to consider at all the greater number of witnesses," is erroneous and cannot be cured by any other language contained in the charge.

Langan v. Chicago City Railway Co., 145 App. 249.

2. INSTRUCTIONS—*when as to credibility of witnesses erroneous.* Held, that the charge of the court in this case was erroneous in the comparison made between the credibility given to the testimony of the lesser and the greater number of witnesses.

3. INSTRUCTIONS—*when error to refuse, upon interest of plaintiff.* Where the defendant is a corporation, it is error to refuse an instruction as follows:

"The jury are instructed that while the law permits a plaintiff in a case to testify in her own behalf, nevertheless the jury have the right in weighing her evidence, of determining how much credence is to be given to it, to take into consideration the fact that she is the plaintiff, and that she is interested in the result of the suit."

4. INSTRUCTIONS—*what not essential to right of jury to consider interest of plaintiff.* It is not necessary in order that the jury may consider the interest of the plaintiff as affecting credibility that the jury first find that such plaintiff was swayed or influenced in giving his or her testimony by his or her interest in the result of the suit.

Action in case for personal injuries. Error to the Municipal Court of Chicago; the Hon. FREEMAN K. BLAKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed and remanded. Opinion filed December 18, 1908.

EDWARD C. HIGGINS and FERDINAND GOSS, for plaintiff in error; JOHN R. HARRINGTON, of counsel.

JOHNSON & LOWENTHAL and JOSIAH BURNHAM, for defendant in error.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

Cora M. Langan brought an action in the Municipal Court of Chicago against the plaintiff in error, Chicago City Railway Company, to recover damages for injuries claimed to have been sustained by her by being pushed from the street car of the company by another woman, a passenger on the same car at the time. The date of the occurrence was September 4, 1906, at about four o'clock in the afternoon.

The plaintiff, Mrs. Langan, was a passenger on a south-bound Halsted street car of the defendant and had notified the conductor that she wished to leave the

car at Seventy-seventh street, and pursuant to her request the conductor gave the signal to stop when the car was midway between Seventy-sixth and Seventy-seventh streets. In obedience to the signal the speed of the car began to diminish, and when the rear or north end of the car had about reached the north crosswalk of Seventy-seventh street and the car was going at the rate of one or two miles an hour preparatory to stopping at the south line of Seventy-seventh street, the plaintiff either stepped off the car and fell backwards to the ground, or was pushed off by another woman. According to the plaintiff's theory, when she reached the rear platform of the car she found the conductor standing at the rear of the platform holding out of the center window of the vestibule a bunch of lighted paper. The checking of the speed of the car caused the flames to reach his hand and he sprang backward against a large woman, who was standing behind the plaintiff, knocking her against the plaintiff, so that both the large woman and the plaintiff fell off the car together, the large woman falling upon the plaintiff.

The theory of the defendant is that the incident of the lighting of a piece of paper had nothing whatever to do with the accident; that the paper had burned down to the conductor's hand when the car was a short distance south of Seventy-sixth street and was there thrown away, and that there was no other woman besides the plaintiff on the rear platform at the time, and that no other woman fell from the car with the plaintiff; that the plaintiff stepped off the car at the north crossing while the car was moving and fell backwards or sideways upon the ground.

The trial of the cause resulted in a judgment in favor of the plaintiff against the defendant, the plaintiff in error here, which seeks to reverse the judgment by this proceeding.

Plaintiff in error contends that the charge to the

jury was highly prejudicial to it, and that it was erroneous in various of its parts.

In charging the jury on the question of preponderance of the evidence the court said:

“The preponderance of the evidence does not mean alone the number of witnesses testifying to a given point, but relates more particularly to the credibility of the witnesses testifying on a given state of facts relative to a given point. The jury are not to be supposed, furthermore, to consider at all the greater number of witnesses. This may be considered along with other facts relating to the evidence. If the jury find from the evidence that a lesser number of witnesses testifying to a given point are entitled to more credit than a large number of witnesses testifying to the contrary of a given point, then it would be the province of the jury to find the greater weight of the evidence in favor of that side having the lesser number of witnesses, but if the jury find that the witnesses testifying upon that side having the greater number of witnesses are equally credible and that their testimony, taken in connection with all the testimony in the case, and the facts and circumstances material to the case, are entitled to greater credibility and that their testimony outweighs the testimony of the lesser number of witnesses, then it would be the duty of the jury to find the issues in favor of that side having the greater number of witnesses”.

The positive and peremptory statement that “The jury are not to be supposed, furthermore, to consider at all the greater number of witnesses”, is not a correct statement of the law. *Hays v. Johnson*, 92 Ill. App. 80, 83; *Eastman v. Street Ry.*, 79 Ill. App. 585, 589. We do not think the above language is in any way modified by what precedes it or follows it in the charge; but if it was modified and the correct rule stated in another part of the charge on that subject it would not cure the error; for the jury would then have been left at liberty to select and act upon either instruction as it might appear to them to be most

proper. C., B. & Q. R. R. Co. v. Harwood, 80 Ill. 88, 91.

The charge of the court upon this point is also objectionable in the unusual and extraordinary comparisons between the credit to be given to the testimony of the lesser and the greater number of witnesses. This portion of the charge tends to emphasize the objectionable portion of the charge first above adverted to. There was a sharp conflict in the evidence on the material facts, and it was, therefore, important that the jury should be accurately instructed as to the law. The larger number of witnesses to these facts testified for the defendant. There was no evidence before the jury justifying any inference that this greater number of witnesses was not credible. We think the charge was highly prejudicial to the defendant, and contained reversible error.

The defendant requested the court to instruct the jury as follows:

“The jury are instructed that while the law permits a plaintiff in a case to testify in her own behalf, nevertheless the jury have the right in weighing her evidence, of determining how much credence is to be given to it, to take into consideration the fact that she is the plaintiff, and that she is interested in the result of the suit”.

This instruction in substance, though in better English, has been approved. West C. St. Ry. Co. v. Dougherty, 170 Ill. 379; C. & E. I. R. R. Co. v. Burridge, 211 *id.* 9, 13. The court refused to give it. It should have been given.

Furthermore, the court in its charge on this subject of weighing the plaintiff's testimony, after telling the jury that they were entitled to take into consideration the fact that she is the plaintiff and interested in the result of the suit, further stated that “if the jury find from the evidence that the plaintiff in giving her testimony was swayed or influenced by her interest in the result of the suit, then you should give

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that fact such weight as in their judgment it is entitled to and give her whole testimony only such weight and consideration as it is entitled to, considering the fact that she was swayed or influenced in giving her testimony by her interest in the case; on the other hand, if you find that the plaintiff in giving her testimony was not swayed or influenced by reason of any interest which she has in the outcome of the case, then you would not be warranted in giving the mere fact that she is the plaintiff in the case any weight whatever, but you would weigh her testimony by the same standard and test it by the same tests as you would the testimony of any other witness''.

The statute removing the disqualification, as witnesses in civil actions, of persons by reason of their interest in the event of the suit, as parties or otherwise, provides that such interest may be shown for the purpose of affecting the credibility of such witness, but the statute does not provide that the jury must first find that the plaintiff was swayed or influenced in giving his or her testimony by his or her interest in the result of the suit before the jury can consider his or her interest as affecting the testimony of such plaintiff, as the charge plainly informed them. It was material error, in our opinion, to refuse the instruction requested, and to give the charge to the jury as it was given.

Inasmuch as there must be a retrial of the case, we refrain from discussing the evidence in the record.

For the errors indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

Constantine Gunszfsky, Defendant in Error, v. Peoples Gas Light & Coke Company, Plaintiff in Error.

Gen. No. 14,239.

1. **MASTER AND SERVANT**—*when not required to furnish safe place to work.* The rule that a master is required to exercise reasonable care to furnish a reasonably safe place to work does not apply where the conditions are changing from time to time in the prosecution of the work. If the nature of the work is such as to produce changes and temporary conditions in the place where the work is performed, the rule does not require the master to keep the place reasonably safe under such changed conditions which the work renders necessary.

2. **MASTER AND SERVANT**—*when doctrine of assumed risk applies.* Where the work which the servant is doing tended to create the dangers from which he suffered his injury, the law is that such servant is held to assume the risk of such dangers and the master is not responsible.

Action in case for personal injuries. Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Reversed with finding of facts. Opinion filed December 18, 1908.

Statement by the Court. Defendant in error Gunszfsky brought an action in the Municipal Court of Chicago against The Peoples Gas Light & Coke Company, plaintiff in error, to recover damages for personal injury. The bill of particulars filed in that court by the plaintiff is as follows:

“Plaintiff’s claim is that whereas on or about the 31st day of May, 1907, at the city of Chicago, state and county aforesaid, the defendant employed the plaintiff as a laborer to work as such in one of their buildings in said city and whereas it became the duty of the defendants to provide for plaintiff a reasonable safe place for him to work so not to endanger his life or limb, yet this defendants disregarding their duty negligently, carelessly and wantonly ordered the defendant

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to do some digging in said building and the plaintiff although using due care and diligence was badly hurt and his head by reason of stone and debris falling on his head suffered great pains and anguish and was hindered from performing his daily work and therefore brings his suit for \$1,000."

On the trial of the cause the jury returned a verdict in favor of the plaintiff and against the defendant for \$1,000, from which the plaintiff remitted \$200 and the court denied a motion for a new trial and a motion in arrest of judgment, and entered judgment for \$800 on the verdict.

The record shows that the plaintiff was employed by the defendant as a laborer at its Division street works in Chicago. The defendant Gas Company was engaged in putting concrete under the foundation walls of its building, for an additional support thereto. It first excavated the earth inside the foundation walls down to the level of the bottom of the foundations. In order to put the concrete under the foundation walls, it was necessary to excavate holes in the floor along and inside of the walls about two or three feet square and eighteen inches deep opposite to the places under the wall where concrete was to be put, for the men to stand in while digging under the wall. The manner of doing the work was to excavate a space under the wall about three feet long, the whole thickness of the wall and eighteen inches deep. When the digging was finished, the concrete was immediately put in under the wall and built up to it, and the remainder of the excavation was then filled in. Between these excavations under the wall were left solid dirt foundations of about six feet long to support the foundation wall until the concrete was put in. It so happened, however, that the hole or excavation which was dug nearest to the one in which the plaintiff was working was ten feet or more away from it. The place where the work was being done was light, and everything was open and in full view.

The plaintiff commenced working at the excavation at about 12:30 in the afternoon, and worked until about four or five o'clock, when some stones from the wall over the excavation fell on his head.

At the close of the plaintiff's case, and again at the close of all the evidence, the defendant moved the court to instruct the jury to find it not guilty. Both of these motions were denied and exceptions to the rulings were saved.

SEARS, MEAGHER & WHITNEY, for plaintiff in error;
JAMES F. MEAGHER and EDWIN HEDRICK, of counsel.

NATHAN NEUFELD, for defendant in error; ISAAC E. KORN, of counsel.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The record shows little controversy of fact. Besides the fact that the danger to which the plaintiff was exposed was open and obvious, it appears that the plaintiff had been warned of the danger by defendant's foreman that stones might become loose and fall and he had been instructed to be careful to be out of the way of such stones. The wall itself, as shown by the evidence, was in nowise defective or dangerous as it stood before the excavation was made. The wall and its foundation was in good condition and contained no defect or cause of danger. The work was done in a proper and careful manner. There is no evidence that any props or supports could or should have been placed under the wall at the point where plaintiff was digging, or that it was customary or usual or practicable to place supports under the wall while the digging was being done. It appears that the work was carefully done, not only in the usual and customary way of doing that kind of work, but that it was done in the only practical manner.

It is clear from the evidence, we think, that there

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was nothing whatever which caused the stones to fall upon the plaintiff except his own digging of the earth from underneath the wall. When he began digging at the place where he was injured, the bottom of the wall at that place was on the level of the floor. This is nowhere questioned or qualified by any of the witnesses in their testimony. There was no danger or possibility of the wall or any stones in the wall falling until the digging was done by the plaintiff. When the plaintiff began to excavate the earth under the wall the conditions were changing every moment as he progressed with his work. Plaintiff knew all the facts and changing conditions as he proceeded with his work, and he knew them before the defendant could know them, unless the foreman stood there all the time. And even then, plaintiff knew better than any one else the existing conditions and dangers, for they were incident to and accompanied the work itself as the earth was removed by him. As the work progressed, the condition of safety was being changed momentarily to a temporary condition of danger, which was created by the digging itself. Plaintiff's testimony shows that he knew stones were liable to fall, for he told the foreman that he should brace them up.

Under the conditions and circumstances shown by the evidence the defendant was not required to exercise reasonable care to furnish the plaintiff, its servant, a safe place in which to work. The leading case, perhaps, in this state upon this subject is *Village of Montgomery v. Robertson*, 229 Ill. 466. In that case the defendant in error was in the employ of the plaintiff in error as a laborer, shoveling gravel in a gravel pit, and his leg was broken by the falling of a gravel bank. By his declaration he averred: "(1) That the gravel pit was a dangerous place to work, which was known to defendant and unknown to plaintiff; (2) that defendant failed to perform its duty to take reasonable care to provide plaintiff a reasonably safe place to work; (3) that plaintiff was directed by defendant's

foreman to work in a dangerous place, the danger being known to defendant and unknown to plaintiff; (4) that after discovering the danger plaintiff reported it to the defendant's foreman and was ordered to continue work". And in the sixth count it was averred "that the plaintiff was inexperienced in such work, and the defendant failed to warn him of the existing danger."

In discussing the application of the general rule that the master must exercise reasonable care to furnish a safe place for his servant to work, the court said, at page 472 of the opinion: "But that rule is subject to limitations and exceptions. One exception universally recognized is, that the general rule does not apply where the conditions are changing from time to time in the prosecution of the work. If the nature of the work is such as to produce changes and temporary conditions in the place where the work is performed, the rule does not require the master to keep the place reasonably safe under such changed conditions which the work renders necessary. (Thompson on Negligence, sec. 3876.) In such a case the master does not make or create the place or conditions, but they are created by the progress of the work and the workmen engaged in it. In this case the removal of the gravel created the attendant dangers, and while a master might become liable for an injury on account of some other fault or neglect, he would not be made liable under the rule here invoked. A master cannot be held to make a gravel pit safe for employes from moment to moment, when the natural support of the bank is being constantly removed and where the changing conditions must be watched and provided against by the laborers themselves".

We think the same principles apply in this case as in the case just cited. The points of similarity are numerous and they are so obvious that it is unnecessary to state them. If the plaintiff seeks to recover on the ground that the foreman of the defendant or-

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dered him to go to work in the building at a certain place and that he took such order as an assurance of the safety of the place, the answer is that at the time such order or assurance was given the place was perfectly safe; and in further answer may be quoted the following from the Robertson case, *supra*, at page 472 of the opinion:

“If what Noteman said was an assurance of safety at the time there was no wrong in giving the assurance, since the bank was then entirely safe and no accident occurred. Such an assurance could not continue indefinitely during the removal of the gravel. When the superintendent was there he had the bank broken down, and any assurance he might have given did not continue during subsequent changes, when a large amount of gravel was removed from the face of the bank”.

It clearly appears from the record that the danger in the work the plaintiff was doing was in shoveling the earth from underneath the wall and that any loose stones in the wall might be left thereby without support and likely to fall when the digging was being done, and it was necessary always for the plaintiff to be on the lookout for the falling of such stones. The plaintiff cannot plead ignorance of the law of gravitation, and its effects on solid substances when their supports are removed. The defendant would have no reason to suppose or presume such ignorance, or that plaintiff needed instruction on that subject. There was no duty laid upon the defendant to warn the plaintiff of such dangers which are patent to ordinary intelligence. (Robertson case *supra*.)

The case of Cleveland, C., C. & St. L. Ry. Co. v. Brown, 73 Fed. 970, 974, is also in point, and holds that the rule under consideration is not applicable to a case like this, “where the place becomes dangerous in the progress of the work, either necessarily, or from the manner in which the work is done”.

The case just cited is followed in Heald v. Wallace,

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71 S. W. Rep. (Tenn.) 80. In that case Wallace was injured by the falling of a rock beneath which he was digging and undermining. He continued to undermine the rock until it fell upon him. The court said, at page 85 of the opinion: "We do not think this rule of the common law applicable in such a case. The principle invoked is usually applied to a permanent place, and not to such places as are constantly shifting and being transformed as the direct result of the employes' labor".

In this class of cases where the work which the servant was doing tended to create the dangers from which he suffered, it has been held that the servant assumed all such risks and the master was not responsible. *Florence & C. C. R. Co. v. Whipps*, 138 Fed. 13; *Utica H. C. Co. v. Whalen*, 117 Ill. App. 23; *Welch v. Carlucci Stone*, 64 Atl. (Pa.) 392; *Livingstone v. Saginaw Plate Glass Co.*, 109 N. W. (Mich.) 431.

In our opinion, therefore, under the bill of particulars and the evidence, no recovery can be had, and the judgment must be reversed with a finding of facts.

Reversed with finding of facts.

James J. Smith, Plaintiff in Error, v. Daniel Eustace, Defendant in Error.

Gen. No. 14,216.

VERDICT—*when set aside as against the evidence.* A verdict will be set aside on review as against the weight of the evidence where clearly and manifestly so.

Forcible detainer. Error to the Municipal Court of Chicago; the Hon. MANCHA BRUGGEMEYER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Reversed and remanded. Opinion filed December 18, 1908.

H. A. TIFFANY, for plaintiff in error.

Smith v. Eustace, 145 App. 261.

No appearance by defendant in error.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

This is a writ of error which brings before the court the record of the Municipal Court of Chicago in an action of forcible detainer brought by James J. Smith, plaintiff in error, against Daniel Eustace, defendant in error, for possession of certain premises in the city of Chicago.

The evidence shows that plaintiff was the owner of the premises in question, and in October, 1902, sold by a verbal contract the property to defendant for the sum of \$900, payable in instalments of \$10 per month until the whole amount was paid with interest at six per cent. on the deferred payments. The defendant with his family took possession of the premises and remained in possession thereof until the action was brought for the possession. The plaintiff paid all instalments as they fell due up to September 24, 1906, and thereafter failed to make payments until demand in writing was made by plaintiff for possession. At this time \$120 was due and unpaid. Defendant refused to deliver possession of the premises on demand, and thereupon the action was commenced.

The jury returned a verdict for the defendant, and the court entered judgment on the verdict.

In our opinion the verdict is manifestly against the clear weight of the evidence, and the trial court should have set aside the verdict and awarded a new trial.

The judgment is therefore reversed and the cause is remanded for a new trial.

Reversed and remanded.

Baker v. Stafford, 145 App. 263.

Bessie Baker, Defendant in Error, v. James W. Stafford, Plaintiff in Error.

Gen. No. 14,225.

This case is controlled by the decision in Clifford v. Stafford, *ante*, p. 247.

Action of contract. Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Reversed with finding of facts. Opinion filed December 18, 1908.

C. VAN ALLEN SMITH, for plaintiff in error.

ADOLPH MARKS, for defendant in error.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The facts as to the special agreement made between the plaintiff in error and the defendant in error in the record in this case are precisely the same as in Georgie Clifford, defendant in error, v. James W. Stafford, plaintiff in error, No. 14224, *ante*, p. 247. For the reasons there given and upon the authorities there cited, the judgment of the Municipal Court of Chicago is erroneous and is therefore reversed with a finding of facts.

Reversed with finding of facts.

William Eugene Brown, Plaintiff in Error, v. The People of the State of Illinois, Defendant in Error.

Gen. No. 13,113.

1. **PERJURY**—*when indictment and verdict correspond.* A verdict convicting a defendant of "attempted subornation of perjury" is not variant from an indictment charging him with an attempt to "incite" to perjury.

2. **PERJURY**—*when false testimony material.* False testimony as

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to a question of fact placed in issue by the pleadings in a cause is material and may be made the basis of a prosecution for perjury.

3. *EVIDENCE—when testimony of absent witness not admissible in criminal prosecution.* The testimony of an absent witness is not admissible on behalf of the defendant in a criminal case even though the People have had an opportunity to cross-examine such a witness in a trial in which both parties were the same and in which the testimony offered was given.

4. *NEW TRIAL—when newly discovered evidence not ground for.* A new trial in a criminal case will not be granted the defendant upon the ground of newly discovered evidence where the motion is based solely upon the affidavit of such defendant and refers to evidence affecting only the credibility of witnesses who testified against him.

Criminal prosecution for subornation of perjury. Error to the Criminal Court of Cook county; the Hon. WILLARD M. McEWEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1907. Affirmed. Opinion filed December 18, 1908.

Statement by the Court. Plaintiff in error was indicted in the Criminal Court for a violation of the following section of the Criminal Code: "Whoever endeavors to incite or procure any other person to commit perjury, though no perjury is committed, shall be imprisoned in the penitentiary not less than one year, more than five years, or confined in the county jail not exceeding one year and fined not exceeding \$1,000", and sentenced to imprisonment in the house of correction for one year, and to pay a fine of \$100 and costs.

An information was filed in the Supreme Court by the state's attorney of Cook county against plaintiff in error, who was a practicing attorney in Chicago and a member of the bar of this State, charging him with certain fraudulent practices and moving for his disbarment. After the respondent had filed his answer, the cause was referred to G. Fred Rush, a master in chancery of the Superior Court of Cook county, to take the evidence and report the same to the Supreme Court. The substance of the information, answer, and of the testimony taken by the master as special

commissioner, is stated in the opinion in the case of *The People ex rel. v. Brown*, 218 Ill. 301.

The first count of the indictment avers that the information and answer thereto were filed in the Supreme Court, and order of reference made as above stated, and further avers that it was pertinent and material to the issue in said proceeding to inquire whether there was such a person as William H., *alias* Billy Barton; whether such person was a detective and whether said Brown had delivered to him a check for \$3,850; that when said proceeding was about to come up for hearing before said Rush, special referee, etc., said Brown unlawfully, etc., endeavored to incite one Charles T. Hass to commit perjury in said proceeding, etc.; that he unlawfully, etc., endeavored to incite and procure said Hass to appear before said Rush in said proceeding and testify that he knew said Billy Barton, had employed him as a detective; that he had been shown by said Barton a check for \$3,850; that Barton went from Chicago to Kansas City to look up one Nelson; when in fact at said time when etc., Hass did not know Barton; had not employed him as a detective; had not been shown by him a check for \$3,850 or any other sum; Barton did not go to Kansas City to look up Nelson and Hass had not told Brown that he knew Barton, or had employed him as a detective or otherwise; or been shown a check by him; or that Barton had gone to Kansas City to look up Nelson, and so etc., said Brown unlawfully etc. did endeavor etc. to incite and procure the said Hass to commit perjury etc.

The second count is substantially like the first except that the proceedings in the Supreme Court and before the special commissioner are stated more fully.

The defendant pleaded not guilty. The jury returned the following verdict: "We, the jury, find the defendant, William Eugene Brown, guilty of attempted subornation of perjury in manner and form as charged in the indictment". Motions for new trial and in ar-

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rest were made and overruled, and judgment entered on the verdict as above stated.

WILLIAM EUGENE BROWN, for plaintiff in error.

No appearance by defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court. We have not been favored with a brief for the People in this case.

The contention that the defendant was indicted for one offense and convicted of another is without merit. To suborn means to incite, to procure, and the offense charged in the indictment was aptly called in the verdict "attempted subornation of perjury".

The contention that the false testimony which the indictment charged that the defendant endeavored to incite and procure Hass to give, was not shown to be material to the point or issue in the disbarment proceedings, cannot be sustained. The information in the disbarment proceedings alleged that the respondent, on the pretext that he wanted to have Nelson apprehended, obtained from the bank the possession of said check for \$3,850 and refused to produce the same, claiming that he had given it to Barton, a detective; that Barton was a fictitious person and the use of his name a fraudulent device used by respondent to get possession of the written evidence of his fraud. The respondent in his answer averred that he delivered the check to Barton, who was known to respondent as a person who did detective work, with instructions to find Nelson; denied that Barton was a fictitious person, etc.

Whether there was such a person as Barton, and whether respondent delivered the check to him, after it came back into his possession, were questions put in issue by the pleadings in the disbarment proceedings. Again, the evidence that there was no such person as Barton, and therefore that the statement of the respondent that he delivered the check to Barton and had not been able afterwards to find Barton, regain

possession of the check and return it to the bank, tended to show that the respondent had suppressed material evidence and was for that reason admissible and material. *Chicago City Ry. v. McMahon*, 103 Ill. 485; 1 Wigmore on Ev. sec. 278.

On the trial the defendant was unable to procure the attendance of several witnesses who had testified in the disbarment proceedings and offered to prove their testimony in such proceedings. The witnesses whose testimony it was offered to prove were all living, but the preliminary evidence showed that some of such witnesses were out of the state, and that others were sick and unable to attend. The parties in the disbarment proceedings and in this case are the same. The people in that proceeding had an opportunity to cross-examine the witnesses whose testimony it was offered to prove in this case. The rule applicable to the testimony of absent witnesses given at a former trial of the same case is applicable in this case to the testimony of absent witnesses given in the disbarment proceedings. The question is therefore presented, whether, in a criminal case, testimony of a witness at a former trial who is out of the state or so ill as to be unable to attend the trial, is admissible for the defendant. On this question the authorities are conflicting. In several of the states such testimony has been held admissible.

In *Bergen v. The People*, 17 Ill. 425, it was held by the Supreme Court of this state that in a criminal case, evidence, for the prosecution, of the testimony of a witness, then beyond the jurisdiction of the court, by procurement of the defendant, given at the examination of the defendant before the magistrate for the same offense, was not admissible.

Among the cases cited in the opinion were, *Finn v. The Commonwealth*, 5 Randolph, 701, and *People v. Newman*, 5 Hill, 295. In Finn's case and in *People v. Newman* the witnesses were out of the state, and the testimony was offered by the prosecution and held not admissible. In *Brogy v. The Commonwealth*, 10 Grat-

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tan, 722, the witness was out of the state and the evidence was offered by the defendant and held not admissible.

To the same effect are *Owens v. The State*, 63 Miss. 450; *Collins v. Commonwealth*, 12 Bush. 271, and *U. S. v. Angell*, 11 Fed. 34, in each of which cases the evidence was offered by the defendant; and *State v. Houser*, 26 Mo. 431, where the evidence was offered by the prosecution. In jurisdictions where such evidence is held admissible, it is held admissible whether offered by the defense or by the prosecution. We regard the decision in *Bergen v. The People*, *supra*, as controlling in this case, although in that case the evidence was offered by the prosecution, and in this case by the defendant, and it follows that in our opinion the evidence was properly excluded.

We find no error in the other rulings of the court on questions of evidence or in the rulings on instructions. The judgment should not, in our opinion, be reversed because of the argument of counsel for the People.

On the evidence, we cannot say that the jury might not properly find the defendant guilty. The material facts tending to show his guilt were testified to by Hass, Mrs. Starek and Mullen, and their testimony was directly contradicted only by the testimony of the defendant.

The defendant filed his own affidavit alone in support of his motion for a new trial, on the ground of newly discovered evidence tending to affect the credibility of Hass, Mrs. Starek and Mullen. The court did not err in denying his motion. *Martinatis v. The People*, 223 Ill. 117.

Finding no error in the record, the judgment of the Criminal Court will be affirmed.

Affirmed.

John B. Whitney et al., Defendants in Error, v. Caroline Bullock et al., Plaintiffs in Error.

Gen. No. 14,222.

1. **CONTRACTS—*what incompetent to aid construction of.*** It is incompetent to show by the parol evidence of one of the parties to the contract the purpose of providing for the payment thereunder of certain installments of money.

2. **CONTRACTS—*what incompetent to aid construction of.*** The statement of an attorney who drafted an instrument made at the time of its execution as to the effect thereof, is incompetent to aid in the construction thereof.

3. **CONTRACTS—*how obligations imposed by determined.*** The obligations imposed by a contract are those created by the instrument and that instrument affords the only evidence of its terms and conditions.

4. **CONTRACTS—*what not, of indemnity.*** A release by the prospective heirs of one to whom money is to be paid given to those who have undertaken to pay such money, such a release only to be operative in the event of the death of the ancestor to whom such money was to be paid, is not an agreement for indemnity against the enforcement of such obligation of payment by the personal representatives of such ancestor.

Assumpsit. Error to the Municipal Court of Chicago; the Hon. THOMAS B. LANTRY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Reversed. Opinion filed December 18, 1908.

MASON & WYMAN, for plaintiffs in error.

ADAMS & FROEHLICH, for defendants in error.

MR. JUSTICE BAKER delivered the opinion of the court.

This writ of error brings before us for review the record of a judgment for \$907.70 recovered by defendants in error against plaintiffs in error in the Municipal Court of Chicago in a cause tried by the court without a jury.

Milo S. Bullock was the husband of the defendant Caroline Bullock and the father of the defendant Blanche B. Cone. He and the plaintiffs were partners

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in business. In February 1906 they entered into the following agreement:

"Whereas each of the members of the co-partnership of Whitney, Christenson & Bullock, of Chicago, Illinois, doing business as clothing manufacturers in the City of Chicago, Illinois, and consisting of John B. Whitney, August Christenson and Milo S. Bullock, all residents of Chicago, Illinois, desires to dissolve the co-partnership heretofore formed and now existing by mutual consent.

And whereas the said John B. Whitney and August Christenson desire to acquire the entire interest of the said Milo S. Bullock and assume all existing liabilities of the said co-partnership:

And whereas the said Milo S. Bullock desires to dispose of his entire one-third interest in the said co-partnership and business now existing for cash and retire from the said co-partnership, on condition that all the present existing liabilities of the said co-partnership of every kind, character and nature be assumed and paid by the said John B. Whitney and August Christenson, their heirs, executors, administrators and assigns, when due and payable:

Now therefore, this agreement witnesseth: that John B. Whitney and August Christenson have in hand paid Milo S. Bullock the sum of six thousand (\$6,000.00) dollars, in cash, and covenant and agree to pay the further sum of one thousand (\$1,000) dollars, in equal monthly installments consecutively of one hundred and twenty-five (\$125.00) dollars cash each and every month beginning March 1st, 1906, to and including October 1st, 1906, until said sum of one thousand (\$1,000) dollars has been fully paid to the said Milo S. Bullock, the total sums aforesaid of seven thousand (\$7,000) dollars shall be in full of his entire one-third interest in the said co-partnership and business, including all capital contributed, all profits, if any have accrued during the continuance of the said co-partnership and business to the date hereof.

The said Milo S. Bullock hereby acknowledges the receipt of six thousand (\$6,000) dollars in cash and does hereby grant, bargain, sell and convey to the said John

B. Whitney and August Christenson, their and each of their heirs, executors, administrators and assigns, forever, his entire one-third interest in the said co-partnership of Whitney, Christenson & Bullock, of Chicago, Illinois, to have and to hold all and singular the said grantor's entire title, right and interest in the assets of the said co-partnership, without any manner of account whatever, and the said John B. Whitney and August Christenson their and each of their heirs, executors, administrators and assigns, hereby assume and agree to pay in full all of the debts, bills, notes or liabilities of the said co-partnership of every kind and character, and all notes, bills for merchandise, or otherwise, wages or material, or other demands of every kind and character now existing against the said co-partnership or individuals thereof, to which said Milo S. Bullock may be in any way liable in law or equity by reason of said co-partnership.

In witness whereof we have hereunto set out hands and seals this 20th day of February, 1906.

JOHN B. WHITNEY [SEAL.]
AUG. CHRISTENSON [SEAL.]
& MILO S. BULLOCK. [SEAL.]

Signed, sealed and delivered in the presence of
W. W. WADE

BLANCHE BULLOCK CONE."

After this agreement was executed, but on the same day, the defendants, without the knowledge of Milo S. Bullock executed and delivered to the plaintiffs the following instrument:

"We, the undersigned, natural and only heirs of Milo S. Bullock, of Chicago, Illinois, do hereby agree as follows:

That should the said Milo S. Bullock depart this life before October 1st, 1906, the period named and provided for the payment of eight certain monthly installments of one hundred and twenty-five (\$125.00) dollars each in a certain agreement of dissolution of even date herewith of the co-partnership of Whitney, Christenson & Bullock, by mutual consent, which said co-partnership is this day dissolved.

In consideration of one (\$1.00) dollar and other valu-

Whitney v. Bullock, 145 App. 269.

able consideration, we hereby agree to release and discharge John B. Whitney and August Christenson, both of the City of Chicago, from any further payments of the said installments upon the demise and decease of the said Milo S. Bullock, should it occur as aforesaid before October 1st, 1906.

Witness our hands and seals this 2nd day of February, 1906.

MRS. CAROLINE BULLOCK, [SEAL.]
BLANCHE BULLOCK CONE. [SEAL.]

Signed, sealed and delivered in the presence of
GEO. J. KUEBLER."

Milo S. Bullock was then ill and died March 7, 1906, intestate. His administrator recovered a judgment against plaintiffs in the Superior Court December 10, 1906, for \$893.70, for the installments falling due under said agreement after March 1, 1906, and interest thereon. This judgment the plaintiffs in this action paid at once to the plaintiffs in the judgment and the judgment was satisfied. The recovery in this case was for the amount so paid by the plaintiffs in satisfaction of said judgment and interest thereon. The cause of action, as set out in plaintiffs' statement of their demand, was for a breach of the instrument signed by the defendants, and the theory of the plaintiffs was, that said instrument was an agreement to indemnify plaintiffs against any installments falling due after the death of Milo S. Bullock, under the agreement between plaintiffs and Bullock, which they might be compelled to pay to his administrator. Both of said instruments were drawn by George J. Kuebler, an attorney who represented Bullock, and plaintiffs had no lawyer.

Plaintiff Whitney testified, over the objection of defendants, that he estimated the value of Bullock's interest in the co-partnership at \$6,000, and that the intention of the parties in "having said additional \$1000, payable in installments, put in the agreement, was to assure to Milo S. Bullock an income of \$125 per month for eight months or so long as he should live". This testimony was clearly incompetent, and in construing

the instrument sued on, will be disregarded. Whitney also testified, over the objection of the defendants, that after said instruments were drafted but before they were executed, "Kuebler informed said Whitney that the effect of the same would be that said Whitney and Christenson would not have to pay any installments on said Exhibit 'A' which would become due after the death of Milo S. Bullock". Exhibit "A" is the instrument executed by the defendants. The instrument signed by plaintiffs and Bullock is Exhibit "B". It is that agreement and not Exhibit "A" that obligated plaintiffs to pay certain installments to Milo S. Bullock. But if by any construction it can be held that Kuebler's declaration referred to the installments falling due under Exhibit "B", the evidence was incompetent and will also be disregarded.

Said Whitney also testified on behalf of plaintiffs, over objection of defendants, "that the reason (as understood between himself and Kuebler, before the execution of said instrument), that the provision to release said Whitney and Christenson from further payments upon the death of the said Milo S. Bullock, was not incorporated in said agreement, 'Exhibit B', was owing to the critical illness of the said Bullock, and the desire of both the said Whitney and the said Kuebler to save said Bullock unnecessary worry over the transaction".

This evidence was also incompetent and will be disregarded.

The obligations of defendants to plaintiffs are those created by the instrument they executed, and that instrument affords the only evidence of its terms and conditions. *Osgood v. Skinner*, 211 Ill. 229.

By the terms of that instrument defendants, "agreed to release and discharge (plaintiffs) from any further payments of the installments (mentioned in the contract between plaintiffs and Milo S. Bullock) upon the demise of the said Milo S. Bullock should it occur as aforesaid before October 1st, 1906".

We know of no rule of construction under which this instrument can be held to be a covenant to indemnify the plaintiffs in case they should be compelled to pay to the personal representatives of Milo S. Bullock installments falling due after the death of Bullock, under the contract between him and the plaintiffs. No doubt as a release the instrument was inoperative for a release, "supposeth a right in being", and defendants had no "right in being", in the contract between plaintiffs and Milo S. Bullock. But it does not follow that because the instrument is inoperative as a release, that it can be held to be a contract to indemnify plaintiffs in case they should be compelled to pay installments falling due after the death of Milo S. Bullock. To so hold would be to give a construction to the instrument not warranted by its language.

In our opinion, the evidence discloses no right of action in the plaintiffs against the defendants on said instrument, and the judgment will therefore be reversed with a finding of facts, and the cause will not be remanded.

Reversed.

William B. McKeand, Defendant in Error, v. Moses S. Feinberg et al., Plaintiffs in Error.

Gen. No. 14,232.

APPEALS AND ERRORS—*when finding of court will not be reversed.* Where a trial is had by the court as to the facts, the court stands in the place of the jury and the decision will be reversed or affirmed by the same rules which govern when the facts are tried by a jury, and the finding not being manifestly against the weight of the evidence it will not be reversed.

Assumpsit. Error to the Municipal Court of Chicago; the Hon. JUDSON F. GOING, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. **Affirmed.** Opinion filed December 18, 1908.

B. C. BACHRACH, for plaintiffs in error.

JOSEPH O. MORRIS, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

The plaintiff in an action in the Municipal Court against plaintiff in error Feinberg, as maker, and plaintiff in error Mayer as guarantor of a promissory note, of which the following is a copy:

“CHICAGO, August 1, 1905.

Four months after date I promise to pay to the order of W. B. McKeand & Co. Five Hundred Dollars at 803 Rookery Bldg., Chicago, value received with interest at the rate of 5 per cent per annum.

M. S. FEINBERG.

Endorsements: GEORGE MAYER,”

had judgment for \$543.80, to reverse which this writ of error is prosecuted.

The note on which the recovery was had was given in renewal of another note for the same amount, dated March 29, 1905, payable four months after date to the order of plaintiff, made by Feinberg and guaranteed by Mayer.

Plaintiff and defendants were interested in the Owl Mining Company of New Mexico. The note of March 29 was delivered by Feinberg to plaintiff, who gave to Feinberg his check for \$500, payable to the order of Baker, plaintiff's bookkeeper, and by him endorsed. Feinberg obtained the money on this check and sent the amount, by telegraph, through a Chicago bank, to the mining company in New Mexico.

The contention of plaintiffs in error is that plaintiff, desiring to invest \$500 more in said mining company, about March 29, 1905, requested defendant Mayer, who was then in his employ, to obtain from defendant Feinberg, his brother-in-law, a note for \$500, and to sign the same as guarantor, so that plaintiff might have the same discounted and thereby procure \$500 to invest in said mining company; that

pursuant to such request and for the accommodation of the plaintiff said note of March 29 was made by Feinberg, guaranteed by Mayer and delivered to plaintiff; that plaintiff had the same discounted for his own benefit; that the check for \$500 that plaintiff gave Feinberg was given to him as an officer of said mining company as an advance to or investment by the plaintiff in said company on his own account; that at the maturity of said note of March 29, it not being convenient for plaintiff to pay said note, defendants, at his request, made and guaranteed the note sued on and delivered the same to the plaintiff, so that he might have the same discounted and with the proceeds pay the note of March 29. This contention was supported by the testimony of the defendants. Their testimony was contradicted by the plaintiff, who testified that he was asked by Mayer in March, 1905, to put more money in said mining company; that he refused to do so; that he was then asked to advance or get the money on a note for \$500 to be made by Feinberg and guaranteed by Mayer, so that they might invest the same in said mining company; that he agreed to make such loan or advance and that the note was made and given to him for money actually loaned and advanced by him to the defendants, and was not made for his accommodation, and that the note sued on was given in renewal of said note of March 29.

The cause was heard by the court without a jury. We are asked to reverse the judgment, on the ground alone that the finding is contrary to and not supported by the evidence.

In *Field v. C. & R. I. R. R. Co.*, 71 Ill. 461, Chief Justice Breese said: "This court has often held, where a trial is had by the court, as to the facts, the court stands in the place of the jury, and the decision will be reversed or affirmed by the same rules which govern when the facts are tried by a jury. *Ambs v. Honore*, 24 Ill. 122; *Eastman v. Brown*, 32 *ib.* 53. And it was emphatically said in *Wood v. Price*, 46 *ib.* 435,

that the same force and effect should be given to the finding of a judge as to the verdict of a jury."

To the same effect are the decisions of this court: *Hays v. Langley*, 90 Ill. App. 500; *Coal Co. v. Beaver*, 95 *id.* 95; *Greer v. Clay*, 99 *id.* 204.

The introduction of the note in evidence made a *prima facie* case for the plaintiff; the defense was supported by the testimony of the defendants which was contradicted by the testimony of the plaintiff. The trial judge heard the parties testify, and his finding not being against the great preponderance of the evidence, it must stand. The judgment is affirmed.

Affirmed.

Frank J. McKay, Plaintiff in Error, v. The People of the State of Illinois, Defendant in Error.

Gen. No. 13,808.

1. **AMENDMENTS AND JEOPAILS**—*when motion to amend record should be made.* A motion to amend a record should not be permitted to be made in "blanket" form and then continued; specification, at least in general terms, should be insisted upon by the court.

2. **AMENDMENTS AND JEOPAILS**—*when amendments may be made after lapse of judgment term.* Amendments of the record of a court after the lapse of the judgment term can only be authorized where there is some official or quasi-official note or memorandum or memorial paper remaining in the files of the cause or upon the record of the court or in the minutes of the judge or in some book required to be kept by him, showing that the record as standing does not speak the truth or contains an omission.

3. **APPEALS AND ERRORS**—*within what time bill of exceptions must be signed.* The bill of exceptions must be signed during the term at which final judgment is entered or within such further time as may be allowed by order entered during the term or within such further time as may be fixed by the extension of such order, such latter extension being made before the expiration of the time fixed by the original order.

4. **APPEALS AND ERRORS**—*when bill of exceptions not considered.*

McKay v. The People, 145 App. 277.

A bill of exceptions signed without jurisdiction is no part of the record and will not be considered on appeal.

5. FALSE PRETENSES—*when indictment sufficiently charges.* Held, that the indictment in this case sufficiently charged false pretenses and that the conviction thereon should be sustained.

Criminal prosecution for obtaining money under false pretenses. Error to the Criminal Court of Cook county; the Hon. GEORGE KERSTEN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1908. Affirmed. Opinion filed December 18, 1908. Rehearing denied January 5, 1909.

CHARLES E. ERBSTEIN, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

Plaintiff in error was convicted of obtaining money by false pretenses, on March 6, 1907. By his consent he was tried before the court without a jury.

There is a peculiarity in the manner in which the motion to quash the indictment, the motion in arrest of judgment and the overruling of both these motions appear in this record. January 16, 1907, the plaintiff in error pleaded not guilty to the indictment. On the same day he was given a hearing and after the hearing the case was postponed to January 19. The cause was continued on the latter date and on several occasions thereafter, upon his motion, until on March 6, 1907, when he was found guilty and a judgment entered. The record shows an order, entered on March 30, 1907, as follows: "Counsel for said defendant now here moves the court to amend the record in this cause, and it is ordered that the hearing on said motion be and the same is hereby continued." On May 28, 1907, the record shows the following: "The motion of the defendant to amend the record heretofore entered and continued hitherto is allowed by the court, and the court orders that the record in this cause be and the same is hereby amended.

“And the court therefore orders as of the sixteenth day of January, 1907, that in the record of the proceedings in this cause on that day, the following words be and are hereby inserted before the record of the plea of the defendant to the indictment: ‘The defendant now here moves the court to quash the indictment in this cause. And the court hearing counsel in support of said motion as well as in opposition thereto and being now fully advised in the premises doth overrule said motion and orders that the motion of the defendant to quash the indictment in this cause be and the same is hereby overruled accordingly.’

“And the court further orders as of the sixth day of March, 1907, that in the record of the proceedings in this cause of said day the following words be and hereby are inserted after the record of the finding by the court that the defendant is guilty, and before the record of the judgment: ‘The defendant now here moves the court in arrest of judgment. And the court hearing counsel in support of said motion as well as in opposition thereto and being now fully advised in the premises doth overrule said motion and orders that the motion of the defendant in arrest of judgment be and the same is hereby overruled accordingly.’”

Courts should make their records speak with some degree of certainty. It is to be observed that the motion to amend is what might be termed a “blanket motion”. It fails to specify even the subject in respect of which emendation of the record was desired. There is no certainty whatever in the motion. We do not know that the order of May 28 was made in pursuance of that motion. For aught the record indicates it may or may not have been. The form of motion is one that for future convenience it may be expedient for practitioners to present in all their cases. The learned trial judge should have required counsel when making the motion to have specified, at least in some general way. Amendments of records are not

permitted on the same grounds that amendments of pleadings are permitted. It is a very serious matter to amend a record by interpolating into the record a motion to quash and an order thereupon after a plea has been entered by the defendant to the indictment, and even after the entry of judgment.

On March 6, 1907, when judgment was entered, plaintiff in error was allowed thirty days within which to present a bill of exceptions. On April 5, 1907, this time was extended by the allowance of thirty days and on May 4, 1907, a further extension of seven days was allowed. According to these orders the time for filing a bill of exceptions expired on May 12, 1907. On May 13, 1907, plaintiff in error applied for and obtained a further extension of seven days. The bill of exceptions shown in the record was not signed or filed until May 22, 1907.

The law does not permit the entering of orders in a cause or the signing of bills of exceptions after jurisdiction has been lost by lapse of time. It is true that after a term at which a cause has been disposed of has expired amendments of the record may be made by *nunc pro tunc* orders so as to make the record speak the truth. But in such cases the amendment must be based upon some official or *quasi*-official note or memorandum or memorial paper remaining in the files of the case or upon the records of the court, the judge's minutes or some entry in some book required to be kept by law. A private memorandum of a witness is not sufficient; nor can the fact proposed to be incorporated into the record be based upon the recollection of the judge or other person, or upon affidavits or testimony taken after the event has transpired. And the basis upon which the amendment was made must be shown and preserved in the order or in the record. *Hubbard v. People*, 197 Ill. 15; *Frew v. Danforth*, 126 Ill. 242. The reason for the requirement that the basis of the amendment be shown and preserved is that the warrant for the exer-

cise of the new jurisdiction may appear. The power of the court to exercise jurisdiction over the parties and the subject-matter expires with the termination of the term. Jurisdiction to exert power thereafter depends upon the existence of facts extrinsic to the record. Without such facts being shown in the record, upon review the record will show no jurisdiction.

Time may be allowed when a final judgment is entered, within which to file a bill of exceptions, and such time may be from time to time extended. But unless a bill of exceptions is presented and filed within the time allowed or before the expiration of a properly allowed extension or extensions, the bill of exceptions does not become a part of the record.

In this case it appears that, by the lapse of time before the entry of the order of May 13, the court lost jurisdiction to sign a bill of exceptions herein. Furthermore, had that order of May 13 been entered in time there would, nevertheless, have been a loss of jurisdiction to sign a bill of exceptions on May 22 when the court did sign what purports to be a bill of exceptions herein. Such records should not be returned to this court.

There should have been no bill of exceptions signed by the presiding judge on May 22, 1907.

It is the imperative duty of the trial judge not to enter orders in a cause or sign any bill of exceptions after jurisdiction has ceased. The court should not be imposed upon nor should the judge presiding permit himself to be imposed upon. If counsel, after jurisdiction has ceased, should culpably present orders for entry or bills of exception for signature with the design of taking advantage of the confidence a presiding judge is entitled to repose in the members of an honorable profession, then such counsel should be most strictly dealt with. The dates of the various orders giving extensions of time and the periods of the extensions herein are not disclosed in the abstract of the record.

McKay v. The People, 145 App. 277.

The purported bill of exceptions in this record, therefore, has not been and cannot be considered, for it is properly no part of the record.

On the question of the sufficiency of the indictment the argument is made that the indictment fails to show that the deceitful practices caused any pecuniary loss. It is true, as contended, that the indictment cannot be explained by extrinsic evidence, *i. e.*, by the evidence appearing in a bill of exceptions.

The indictment is not correctly construed by counsel for plaintiff in error. The indictment does present that, on March 10, 1906, Frank J. McKay pretended to Batchelder & Hunt, co-partners, that he, McKay, had, before that time, for and on behalf of Batchelder & Hunt, paid for twelve horses purchased for them the sum of \$1,132.75. That this pretense was a false pretense and this false pretense was then and there made by him with the design and purpose to then and there induce Batchelder & Hunt to pay him the sum of \$165. That Batchelder & Hunt, then and there believing such false pretense to be true and being then and there deceived thereby, were then and there by reason thereof induced to pay him said sum of \$165, and by this false pretense said McKay did then and there obtain from Batchelder & Hunt said sum of \$165 in money. That this false pretense was then and there made by McKay to Batchelder & Hunt with the design and for the purpose of then and there cheating and defrauding them of said sum of \$165 so obtained. To the foregoing statement of facts, which we regard as a sufficient indictment in law, there are added averments to the effect that in truth and in fact McKay knew that he had not paid for the horses the sum of \$1,132.75 but, in truth and in fact, as he well knew, he had paid for them the sum of \$967.75 and he knew his pretense to be false.

What McKay obtained by means of his false pretense, *viz.*: \$165, is an entirely separate and distinct matter from obtaining a return of such money, if any,

as he may have laid out and expended for Batchelder & Hunt. Counsel is confused in his argument by failing to differentiate between what the averments in fact are, i. e., that by certain false pretense McKay succeeded in obtaining \$165, which constitutes a crime and what counsel in his own mind assumes to be a fact and concerning which nothing is averred, viz.: that McKay had paid out and expended for Batchelder & Hunt a certain large sum of money which he was entitled to get back. He may and he may not, so far as the indictment is concerned, have been entitled to receive back money laid out for the firm. That is beside the question. The fact, if it be one, would not permit him to falsely represent that he had paid out for the firm \$1,132.75 when he had not paid out such sum and by such false representation, as the indictment avers, obtain from the firm \$165. The falsity of the pretense, it is averred, induced the firm to pay over to him \$165. Be the fact one way or the other as to his having advanced money which should be returned to him, the averments of the false pretense and the obtaining of the \$165 thereby still remain. We find no error prejudicial to the plaintiff in error in this record.

The judgment of the Criminal Court is affirmed.

Affirmed.

People of the State of Illinois ex rel. Herman B. Myers, Plaintiff in Error, v. Joseph F. Haas, County Clerk of Cook county, Defendant in Error.

Gen. No. 13,952.

1. **PUBLIC OFFICES**—*when two, cannot be held at the same time.*
A single person cannot at the same time hold two public offices if incompatibility exists between the two so held.

2. **PUBLIC OFFICES**—*how incompatibility between, determined.*
In connection with the right of a single incumbent to hold two

People v. Haas, 145 App. 283.

public offices incompatibility between such offices may arise (1) when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other and (2) where the duties of either office are such that the holder of that office cannot in every instance, properly and fully, faithfully perform all the duties of the other office.

3. PUBLIC OFFICES—*what two offices may not be held.* By constitutional enactment incompatibility exists between the office of state senator and that of clerk of the Municipal Court of Chicago and the same person cannot hold both offices at the same time; likewise, is there incompatibility between the two offices arising by virtue of the duties cast upon the incumbents holding them.

4. PUBLIC OFFICES—*what amounts to resignation.* The acceptance of a second public office which is incompatible with another public office held by the same person, operates *ipso facto* as a resignation from the first office.

5. MANDAMUS—*when lies against county clerk.* Mandamus lies to compel the county clerk to notify the governor that a vacancy exists in the office of state senator when he becomes apprised that a state senator has been elected to the office of clerk of the Municipal Court.

Mandamus. Error to the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1907. Reversed and remanded with directions. Opinion filed December 18, 1908.

Statement by the Court. On November 8, 1904, Homer E. Galpin was elected state senator from the second senatorial district in this state and on January 11, 1905, he qualified and took his seat. When the petition herein was filed his term of office had not yet expired by the lapse of time. At the election held November 6, 1906, Galpin was elected clerk of the Municipal Court of the City of Chicago, and on December 3, 1906, he duly qualified as such clerk and entered upon the duties of that office. It is contended that Galpin cannot hold both offices and that his act in accepting the clerkship of the Municipal Court amounted to a resignation, at that time, of the state senatorship.

To test this contention the petition for *mandamus* now under consideration was filed, on February 23, 1907. The law of this state imposes upon the county clerk of the county in which a state senator resides,

the duty to notify the governor when a vacancy occurs in the office. Upon receiving such notification it becomes the duty of the governor to call an election to fill the vacancy, unless there shall neither then be a session of the General Assembly nor be any session thereof before the next general election. Rev. Stat. chap. 46, sec. 129. By statute it is also provided that whenever it is alleged that a vacancy in any office exists the officer whose duty it is to fill the vacancy, by ordering an election, shall have the power to determine whether or not the facts occasioning a vacancy exist. *Ib.* sec. 126. The governor, not the county clerk, has the power to determine whether a vacancy exists in a state senatorship. But the governor acts upon information from the county clerk of the proper county. In the petition herein Cook county is shown to be the county wherein State Senator Galpin resides and, consequently, it became the duty of the county clerk of that county to notify the governor when a vacancy occurred in the second senatorial district. Evidently being in doubt regarding his duty in the premises, as not he but the governor possessed the power to determine whether a vacancy existed, the county clerk of Cook county did not notify the governor of any vacancy in the senatorship of this district when Galpin accepted the Municipal Court clerkship. Thereupon this petition for a *mandamus* requiring the county clerk to notify the governor was filed.

This petition sets up that the respondent, Joseph F. Haas, is the county clerk of Cook county, that it is his duty to notify the governor that there is a vacancy in this senatorship and that he has and does refuse to do so. The petition prays for a writ of *mandamus* commanding Joseph F. Haas, county clerk of Cook county, to forthwith notify the governor of the vacancy. A general demurrer to the petition was sustained in the Circuit Court and, petitioner electing to stand by his petition, the same was dismissed at petitioner's costs. From the order of dismissal this writ of error is prosecuted.

THOMAS E. D. BRADLEY and SAMUEL E. HARPER, for plaintiff in error.

BARKER, CHURCH & SHEPARD, for defendant in error;
FRANK L. SHEPARD, of counsel.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

There is no question in this case as to the election of Homer K. Galpin to the office of state senator nor as to his qualification to hold the office. Indeed the contention, by the petitioner, that Galpin by his voluntary act and conduct resigned the state senatorship, eliminates the questions of his election as such and of his possessing the requisite qualifications for holding the office. The sole question is: Has he by his voluntary act resigned? Neither is there any question of "ousting" Mr. Galpin from the senatorship involved. This record now before us does not disclose to us that Mr. Galpin is seeking to hold two public offices and to draw two salaries from the people at the same time. He is not a party to this proceeding, and from this record we do not know whether or not he claims to be senator. So far as this record is concerned he is passive. If he has resigned, then he does not hold the office of senator, but not because of any question in respect to his election or of his lacking in any qualification for the office.

If there be incompatibility in the holding of the two offices, then Mr. Galpin must be held to have resigned the senatorship. Incompatibility, in this connection, is present when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other and, also, where the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office. This incompatibility may arise from multiplicity of business in the one office or the other, considerations of public policy or otherwise. Bacon's

Abridgement Vol. 7, Tit. "Officers", K.; Rex v. Tizard, 9 B. & C., 418; 1 Dillon on Mun. Corp., p. 308-9, secs. 225-7 and note 4; McCrary on Elec., secs. 336 *et seq.* 4th Ed.; Mechem on Pub. Off., sec. 429; Dickson v. People, 17 Ill. 191; People *ex rel* v. Hanifan, 96 Ill. 420; Packingham v. Harper, 66 Ill. App. 96. From these authorities it also appears that in case of incompatibility the acceptance of the second office is *ipso facto* a resignation of the first office. By his own action the officer expresses his voluntary resignation.

In the constitution of the State of Illinois, Art. IV, sec. 3, we find the following provision: "No judge or clerk of any court * * * or person holding any lucrative office under the United States or this State * * * shall have a seat in the General Assembly".

This language is plain and to the point. Thereby a constitutional incompatibility is declared which forbids one person from holding the offices of state senator and clerk of the Municipal Court at the same time. Twice did Mr. Galpin solemnly swear to obey this constitution, first, when sworn in as senator and again when he was sworn in as clerk of the Municipal Court. We cannot presume in Mr. Galpin any such mendacity as that when he took his oath of office as clerk of the Municipal Court he meant otherwise than to resign the senatorship.

In the Revised Statutes of Illinois, chap. 37, sec. 277, we find the following provision:

"That there shall be a clerk of said Municipal Court * * * . He shall perform, with respect to said Municipal Court the duties usually performed by clerks of courts of record. He shall give his personal attention to the performance of the duties of his office. He shall maintain an office in each district and each office shall be kept open for the transaction of business from eight o'clock A. M. to six o'clock P. M. of each working day during the year".

Under this act the clerk of the Municipal Court is not, of course, required personally to attend to the

details of the work in his office. He is, however, mandatorily required to give his "personal" attention to the performance of the duties of his office. This he does not do if he is personally absent from his office so that he cannot be found there during business hours from day to day by the judges of the court, his subordinates, lawyers, litigants and the public. The Municipal Court is a court in which there is transacted a large amount of litigation and constant supervisory attention is consequently required. This the statute provides shall be "personal" and he cannot, therefore, rightfully delegate it to a subordinate. The term of his office is six years. The duties of a state senator are purely personal in their nature. During the sessions of the General Assembly his personal presence is constantly required if he shall honestly and conscientiously perform the duties of that office. There may also be special sessions of the legislature. While the General Assembly is in session the duties of a state senator require his presence in Springfield. The duties of a clerk of the Municipal Court require his constant presence in Chicago. The incompatibility is clear.

Counsel for defendant in error advance the argument that the courts of the state may not try the title and qualifications of a senator to his seat in the senate. Undoubtedly it is true, and we dare not gainsay it because the constitution so provides, that in the General Assembly each house shall "be the judges of the election returns, and qualifications of its members". Far be it from us to undertake to adjudicate in respect to the election, the election returns or the qualifications of Mr. Galpin as a state senator. For the purposes of the present inquiry we may, however, determine, and not only that but it is our duty, under the law, to determine and adjudicate upon the question, whether or not Mr. Galpin has voluntarily resigned the office of state senator of the second district. We are not to be deterred from performing our duty

in this respect, as we understand it, because of the closeness, in subject, of that question to the other questions of title and qualification. We follow the law as laid down by our Supreme Court. A like closeness of subject arose in the case of *People ex rel. Melville W. Fuller v. Hilliard*, 29 Ill. 413. From that case it appears that our present Chief Justice of the Supreme Court of the United States was candidate for a seat in the General Assembly in 1862. That case was an original petition for a *mandamus* requiring the respondent L. P. Hilliard, county clerk, to issue a certificate of election, which he refused to do because of a defect in the affidavits of two of the judges and two of the clerks in a certain election precinct. The returning board, composed of Mr. Hilliard and two justices of the peace, refused to count the votes of this precinct and these votes not counted were decisive of the election. Objection was made to the issuance of the writ for the reason, among others, that the court had not jurisdiction, as the House of Representatives alone had jurisdiction. The court awarded a writ of *mandamus*. Among other things the court said: "Though the House of Representatives is the sole and exclusive judge of the qualifications of its members, this application has no reference whatever to the point of qualifications". The board of canvassers was merely a ministerial body, it was held, and in asking for its certificate the relator did not ask to be admitted to office, that is, to turn one man out and put the relator in.

The statute makes it the duty of the governor to decide when a vacancy exists and to call an election. The statute makes it the duty of the county clerk to notify the governor. And in section 126 of chapter 46 of the statute it is said that whenever it is alleged that a vacancy in this office exists the officer whose duty it is to fill the vacancy by ordering an election shall have the power to determine whether or not the facts occasioning the vacancy exist. Of course in the

last instance the senate decides upon the title of a senator to office. But nevertheless there is a duty resting upon the governor to act when a vacancy is alleged and the county clerk cannot, by refusing to perform his mere ministerial duty, prejudice the question which the statute requires the governor to decide. When application is made to a court to compel the county clerk to perform this ministerial duty it becomes the duty of the court, before acting upon the application, to determine whether the situation exists which makes it the duty of the clerk to perform his ministerial duty. If, upon the notification from the county clerk, the governor decides that a vacancy exists and calls an election and at an election thereupon held a senator is elected, then, the question may come before the senate and what the senate determines will be final. But the county clerk may not, by his refusal to act, prejudice the whole matter and prevent the question from ever coming before the senate. If the county clerk refuses to perform his merely ministerial act the court will compel him. See on this subject *Rhode Island v. South Kingstown*, 18 R. I., 258 (22 L. R. A. 65). Were it not so then the statutory provision giving the governor power of determination would be but an idle provision.

There is no doubt as to the right of the relator to the writ of *mandamus* as prayed for. The judgment of the Circuit Court is reversed and the cause remanded to that court, with directions that it overrule the demurrer of the defendant to the petition and proceed with the cause in conformity with this opinion.

Reversed and remanded with directions.

Joseph N. Gettys et al., Defendants in Error, v. Phillip A. Marsh, Plaintiff in Error.

Gen. No. 14,223.

1. **SALES**—*presumption as to time of consummation.* The presumption is that every sale is to be consummated at once.

2. **CONTRACTS**—*when undertakings of parties fixed without formal instrument.* A written proposition and acceptance fixes the rights of the parties without the execution of a formal contract where at the time of the making of such proposition and acceptance thereof there was no apparent intention of entering into a formal contract.

3. **CONTRACTS**—*how question of existence of, determined.* Where the existence or non-existence of a contract depends upon writings alone, it is error to submit the determination of such question to the jury. *Held*, however, in this case that the error of so submitting such question to the jury was harmless in that the jury properly found the existence of the contract.

Assumpsit. Error to the Municipal Court of Chicago; the Hon. FREEMAN K. BLAKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Affirmed. Opinion filed December 18, 1908.

DURAND & CUNNINGHAM and CHARLES A. PHELPS,
for plaintiff in error.

CHARLES T. FARSON and GARDNER, STERN & ANDERSON,
for defendants in error.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

J. B. Albach & Co. are merchandise brokers in St. Louis, Missouri. This suit is an action of assumpsit by Joseph N. Gettys and Harry C. Gilbert of St. Louis against Phillip A. Marsh of Chicago. The action is brought upon a contract made by the plaintiffs and defendant, through J. B. Albach & Co. as brokers, for the sale of one thousand cases of standard canned corn at ninety cents per dozen which contract, it is alleged, Marsh refused to carry out, to the damage of Gettys & Gilbert.

The action was brought in the Municipal Court, where a trial before a jury was had. The jury returned a verdict for \$225 against Marsh, plaintiff in error, and on October 19, 1907, a judgment was rendered upon the verdict. To reverse that judgment this writ of error was sued out.

The only evidence of a contract of sale and purchase consists of correspondence between Marsh, in Chicago, and J. B. Albach & Co., the brokers, in St. Louis. Gettys & Gilbert, of St. Louis, claim as principals in the transaction. There is no evidence in the record showing the existence of the relation of Gettys & Gilbert as principals of J. B. Albach & Co., the brokers, at the inception of the negotiations. Marsh contends that the minds of the parties never met in the consummation of a contract of purchase and sale. While Marsh also was a broker, he acted for himself in this transaction. Plaintiff in error introduced no evidence and as the only evidence, bearing upon the formation of a contract, is to be found in the correspondence there is in this regard no conflict in the evidence and, hence, in that respect nothing remains for the court except interpretation of the language of the parties. This is a function of the judge and not of the jury.

On September 18, 1903, Marsh wrote a letter to J. B. Albach & Co. offering certain other merchandise, and ended his letter by saying, "Regarding corn, beg to say I have a lot of one thousand cases of corn, for which I want 90¢ per dozen. Quality is first class standard corn. I was at the factory yesterday and saw them putting up as pretty corn as I ever saw go into cans. Think this corn is cheap at \$1.00 a doz."

Standard corn does not mean corn of any particular place or pack, but is corn of a good color, tender and of a good consistency. The Chicago market is the standard in price for the middle or central west consisting of the states of Iowa, Illinois, Wisconsin, Indiana and Michigan.

Albach & Co. replied to this letter by mail the next day, September 19, as follows: "As per your letter of the 18th enter Gettys & Gilbert one thousand cases number two Standard corn, ninety cents Janesville, cash less one and one-half per cent.; wire immediately if all right". To this letter Marsh responded by a postal of the same date, September 19, saying: "Am just back from the country. Frost has played H—with us. Can't entertain your offer of 90¢, am sure corn will bring a 1 case note per doz. before we have another moon full, hear me and heed. Get wise, Bro. Jim. Would have wired you had I got to office in time to do you any good".

Apparently Marsh, notwithstanding his own offer, was making an effort to get a higher price. On the 21st of September Albach & Co. wrote him: "Now in the tone of your letter of the 18th, which we wired you on Saturday morning, made a positive offering of a 1000 c/s of corn at 90¢ which we took and asked you for telegram in reply confirming in the usual way. We are sorry that you cannot fill this order as it looked very much, like we said before, a positive offer on your part, and our parties will be very much disappointed too". Undoubtedly Marsh's letter of the 18th and Albach & Co.'s reply of the 19th was an offer and an acceptance; but by their letter of the 21st Albach & Co. acquiesced in Marsh's rescission.

After receiving the Albach letter of the 21st, however, Marsh evidently concluded he could not get a higher price for his corn, so on the 24th of September he sent both a telegram and a letter to Albach & Co. The telegram is as follows: "Will accept your offer thousand cases standard corn ninety cents Janesville, wire pleasure", and the letter is as follows: "Have wired you accepting your offer on corn providing you want it and ask your pleasure, 90¢ Janesville. * * * I am awaiting your pleasure regarding the 1000 cases of corn".

While Marsh speaks of "your offer" he, in reality,

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was renewing his own previous offer and his communications at this time are to be considered in the light of the previous correspondence. Albach & Co. promptly, on the same day, the 24th, replied as soon as they received the telegram. Their reply is as follows: "Enclosed find confirmation of telegram received from you this morning accepting order for 1000 c/s corn at 90¢ f. o. b. Janesville, Wis. Kindly send us contract to deliver to Gettys & Gilbert, this city, and hold same for shipping instructions from them". There is not the slightest question but what the minds of the parties had now met as to the subject-matter of the contract, the price and the place of delivery. It is a horn-book principle in the law, with reference to sales of merchandise, that there is a presumption that every sale is to be consummated at once. 1 Parsons on Cont., p. 519, 6th Ed. The witnesses as to the custom of the market testified the telegram meant payment to be net in 60 days or 1½% discount if paid within ten days. On this point there is no dispute in the evidence. The parties were mutually bound. It is true that in the letter of the 24th Albach & Co. say: "Kindly send us contract to deliver Gettys & Gilbert, this city". But Marsh, so far as we can see, did not contemplate, as a condition precedent to the completion of the contract the parties were negotiating, that it should be reduced to a formal written one; nor does he in any way indicate any intention that the contract should, before completion, be reduced to a formal one. We cannot gather from anything said or done by Albach & Co. that they contemplated or intended, as a condition precedent to the completion of a contract, that there should be a formal written one. The law, in this instance, did not require, in order to make the contract valid, that it should be formal. The contract was completed so far as the law required and, in view of their experience, Albach & Co., to evidence the contract made, desired that Marsh reduce it to a formal written one. The

expression to him of this desire did not authorize or permit him to vary the terms of the contract already made. Such contracts as this need not even be in writing, and it is the law in such case that when all the terms are mutually agreed upon, so that the contract is complete, then an arrangement for the reduction thereof to a formal writing does not prevent or even suspend its effectiveness. In *B. & O. S. W. Ry. Co. v. People*, 195 Ill. 423, 428, the Supreme Court quoted the rule as follows: "The true rule may be stated in these words: Where the parties make the reduction of the agreement to writing, and its signature by them, a condition precedent to its completion, it will not be a contract until that is done. And this is true although all the terms of the contract have been agreed upon. But where the parties have assented to all the terms of a contract, the mere reference to a future contract in writing will not negative the existence of a present contract". In *Scott v. Fowler*, 227 Ill. 104, quoting with approval from Sec. 319 *Bishop on Contracts*, the court said: "If parties agree on terms, however precise, '*subject to the preparation and approval of a formal contract,*' the concurrence of their wills is suspended, and where nothing further is done there is no contract. Yet the mere fact that the reduction of an informal agreement, oral or written, to a formal written one, was contemplated or stipulated for, does not prevent the former from taking immediate effect. The question whether it does or not depends upon what the parties intended". Manifestly this rule is both logical and just. In the case at bar it would be obviously unjust for us to hold that the parties had not passed out of the stage of preliminary negotiations.

On the 28th of September Marsh wrote Albach & Co. as follows: "I herewith enclose you contract for Gettys & Gilbert for 1000 cases of corn. Please have the original signed, return to me promptly, and oblige. Have the contract made out on the company's contract

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as I have no forms of my own". The writing enclosed was as follows:

"Farms and Factories at Cassville, Prairie du Chien, and Janesville, Wis.; also Dubuque, Iowa.

Sept. 26, 1903.

M. GETTYS & GILBERT, St. Louis, Mo.

Bought of P. A. Marsh,

37 River st., Chicago, Ill.

Janesville, Wis.

	Cases 2 lb. Dewey, Bower City		
	or Maple Leaf Brand Corn.....at		per doz.
1000	Cases 2 lb. Corn	at 90¢	per doz.
	Cases 2 lb. River View Corn.....at		per doz.
	Cases 2 lb. Pride of Cassville		
	Corn	at	per doz.
	Cases 2 lb. Pride of Janesville		
	Corn	at	per doz.
	Cases 2 lb. Key City Corn.....at		per doz.
	Cases 3 lb. Dewey Brand Toma-		
	toes	at	per doz.
	Cases 3 lb. Badger State Toma-		
	toes	at	per doz.
	Cases 3 lb. Key City Tomatoes at		per doz.
	Cases 3 lb. Badger Brand Canned		
	Kraut	at	per doz.
	Cases 3 lb. Dewey or C. V. Canned		
	Kraut	at	per doz.

F. O. B. cars at Janesville, Wis.....

Terms.....cash.....less one and one-half % if paid within ten days from date of invoice. Shipments to be made at packer's option during month of October 1903.

(In case of a partial failure of the crop we consent to the cutting down of this order, *pro rata*, with all other orders taken, of thirty per cent., without liability for claim for damages, and to accept a cash payment of fifteen cents per case for the cutting down of an additional twenty per cent. In case of destruction of the cannery by the elements, the packer is not to be held liable for damages for non-delivery.)

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REMARKS:

.....Brokers. P. Hohenadel, Jr. Co.
 The above order accepted this 9/29th day of.....1903.
 GETTYS & GILBERT."

Mr. Marsh had taken a printed blank of P. Hohenadel, Jr., & Co., who were packers of corn, while he, Marsh, was a broker dealing in corn, and had not fully adapted the form to the condition he was dealing with.

On the 29th of September Albach & Co., writing Marsh with reference to other corn, added the following: "Further, replying to yours of the 28th, enclosed find contract from Gettys & Gilbert, and you will note they have scratched the stipulation as to delivery, stating that they have bought spots". "Spots" means a purchase for cash or immediate delivery in contradistinction to "futures", a purchase for future delivery, according to the custom in the corn market. The part within the parentheses had been crossed out by Gettys & Gilbert. To this letter Marsh replied on the 30th as follows: "Your favor of yesterday at hand, containing Gettys & Gilbert's contract, with conditions changed from what they originally were. You ought to know that such conditions are not equitable, and we beg to say, we turn this order down for the reasons above named". On October 1st, Albach & Co. wrote Marsh a letter protesting, and to this Marsh, on October 2nd, replied: "Your favor of yesterday at hand, and in reply beg to say that we are still packing corn in the north. Will be for several days yet. I still adhere to contents of my letter of the 30th. Would like to know what protection a packer would have against fire-clause or anything else when he is selling corn, without the packer's clause, as it originally stood. You know as well as anybody when conditions are changed after they are signed by the maker, they are void. Wish you would so advise Gettys & Gilbert". These two letters of Marsh's are a refusal to carry out his contract. There was some more correspon-

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dence between the parties, but it is not material, except that it may be noted that on October 12th he closed a letter by saying: "As far as I am concerned, this ends the matter, as far as this contract goes I absolutely refuse to ship the goods, as I am under no legal or moral obligation to do so". The only reason Marsh ever gave for his refusal was this crossing out of part of the printed form of contract, by Gettys & Gilbert. What was stricken out was something at no time mentioned between the parties. It had not the remotest applicability in a sale for immediate delivery between a seller who was not a packer of corn and a purchaser from him. Terms in respect to a whole or partial failure of crop might have applicability in a sale by a packer of an output before the crop is grown, but such terms in this sale for immediate delivery made in September, after the year's crop was harvested, would have been an absurdity. Whether or not the packer should or should not be held liable in case of destruction of his cannery was, as between these parties, equally irrelevant.

We cannot hold that parties may evade performance of their contracts for any such reason. The question of the amount of damages that resulted from the refusal to carry out the contract, being the difference between the contract price and the market price, was properly left to be fixed by the jury. The refusal by Marsh to perform fixed the time of breach. The difference between the contract price and market price on the day of refusal was testified to be from 95¢ to \$1.05. Hence there is evidence in the record which justifies the amount of the verdict. There is evidence that Illinois, Wisconsin and certain other states are termed the central or middle west market for corn, and it appears from the evidence that in this market the corn is sold delivered at Chicago or f. o. b. factory so that therefore Chicago practically fixes the price. The freight rate between Janesville and Chi-

cago was shown. The evidence is ample to warrant the amount of the verdict.

Counsel for plaintiff in error contend that the trial judge erred in submitting to the jury a question of law in that he submitted to the jury the question whether the plaintiff's exhibits constituted a contract; and counsel say: "there can be no doubt but that these instructions are erroneous". We agree with counsel in this contention. Here, if there was a contract at all, and we have above held there was, it arose entirely upon the correspondence between the parties, for there is no oral evidence on the subject. Hence there is no conflict of testimony on the subject of what occurred between the parties. Whether upon what occurred a contract can be predicated is, then, a question of law. "The questions as to what writings should be considered, and whether or not those considered constituted a written contract, and whether or not the written contract fully expressed the agreement between the parties, were for the court". *Telluride Power Co. v. Crane Co.*, 208 Ill. 218, 226. This is a familiar rule. The trial judge should by interpretation of the language and construction, according to the principles of the law, have determined whether or not the negotiations conducted by correspondence ripened into a contract and what that contract was and instructed the jury accordingly.

Conflict in language used by parties is to be disposed of by the trial judge, alike, whether it occurs in a contract written on one sheet of paper or in a contract consisting of letters which have passed between the parties, so long as there is no dispute as to the language actually used. Had there been such conflict of language that the terms of the contract were not clearly settled and agreed upon, then there would not have been a contract. But in this particular case plaintiff in error was in nowise injured by the error of submitting to the jury the question of the existence of a contract, for the jury found that there was a con-

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tract such as we have above found, that the parties entered into.

Other points are made by plaintiff in error which we have fully considered, but we find no reversible error in the record. We are fully satisfied that the judgment below is not contrary to the law applicable or the evidence in the case.

The judgment of the Municipal Court is affirmed.

Affirmed.

**Joe Barni, Defendant in Error, v. Warren Springer,
Plaintiff in Error.**

Gen. No. 14,228.

MASTER AND SERVANT—duty to furnish safe place. It is the duty of a master to exercise reasonable care to furnish his servant a reasonably safe place in which to perform his duties to the master; when the nature of the business in and about which the servant is employed is such that the exercise of reasonable care requires it, then there is on the part of the master an active and continuous duty of inspection to discover hidden or latent defects. The servant may rely upon the discharge by the master of his duty in this respect.

Action in case for personal injuries. Error to the Municipal Court of Chicago; the Hon. FREEMAN K. BLAKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Affirmed. Opinion filed December 18, 1908.

Statement by the Court. Plaintiff in error sued out this writ of error to reverse a judgment obtained against him in the Municipal Court for \$1,000, in an action on the case for a personal injury.

Joe Barni, defendant in error, who recovered the judgment, was employed by plaintiff in error, Warren Springer, as a fireman in the latter's building. There were an east and a west boiler room in the building. In the west room the boilers are placed in a row along

the north side of the room. In front of them there is a space ten or twelve feet wide. But south of the boilers manure, used for fuel, is piled, beginning three feet in front of them and running to the south wall, so that a lane or passage-way three feet wide is left open. Approximately over this lane, parallel to the line of boilers and fifteen or twenty feet overhead, runs the main steam pipe which carries the steam from all the boilers to the engine room. The pipe is a ten-inch pipe. December 10, 1906, at about six o'clock in the morning, Barni was called to this west boiler room to fix a loose bolt on the face of a boiler. Five or six men, including Falvo, who was engineer and foreman, stood around and watched. Barni stood in the lane, working at the bolt on the boiler. Suddenly the main steam pipe overhead blew out and filled the room with steam and hot water. The pipe pulled out of a T fitting. The threads, as the witness Wishart and Springer himself inform us, were badly strained, weakened and not full enough to hold the parts together. The other men escaped with but slight injuries, but Barni was blinded by the steam and was horribly scalded. There is no dispute but what the injury sustained warrants the amount awarded.

STEDMAN & SOELKE, for plaintiff in error.

PECKHAM, PACKARD, AP MADOC & WALSH, for defendant in error.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

We find here a total absence of negligence on the part of the servant. Barni was in no way at fault.

It is the duty of a master to exercise reasonable care and prudence to furnish the servant a reasonably safe place in which to work and perform his duties to the master. When the nature of the business in and about which the servant is employed is such that

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the exercise of reasonable care requires it, then there is on the part of the master an active and continuous duty of inspection to discover hidden or latent defects. *Bailey's Master's Liability*, pp. 93, 101, 107-8. The servant may rely upon the discharge by the master of his duty in this respect. "In other words, the master has a duty of inspection as well as of observation; the obligation of the servant is that of observation". *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, 376; *Cribben v. Callaghan*, 57 Ill. App. 544; affirmed in 156 Ill. 549; *Libby v. Scherman*, 146 Ill. 540; *Baier v. Selke*, 211 Ill. 512, 517; *Armour v. Brazeau*, 191 Ill. 117, 125. "The master cannot screen himself from liability upon the ground that he did not know of the defects in his appliance, if he might know of them by the exercise of due care. 'The law will imply and infer notice of any defect, which, by the use of ordinary care, might have been known to the master'." *Missouri etc. v. Dillon*, 206 Ill. 145, 152. The verdict being against Springer, the jury found as a fact that the operation by him of his steam plant was a business of such character that, for the safety of his servants employed about it, it imposed upon him the duty of active and continuous inspection to discover hidden or latent defects. Of course, only such duty of inspection was imposed as ordinary care required, the steam plant and its nature being considered. The evidence shows that the building wherein he maintained the steam plant was put up by Springer about fifteen years previous to the time Barni was injured. Springer testified that he did not put in the boiler room until five or six years after the building was put up and that the steam main was put in "about eight, nine or maybe ten years ago". Wishart, a mechanical engineer who had previously done work for Springer, was called in by him immediately after this "blow out" to advise him, and together they inspected this ten-inch main. Wishart says of the main, that right at the joint the pipe was out of line and "it was piped rather care-

less"; that if the joints were not square with each other it would result in an undue strain at some particular point; that where the threads are is the weakest point in the pipe and the strain would come where they were out of square and that the fittings were in fact badly strained; that when they subsequently used part of the pipe a good deal of it was found to be crystallized and "pitted", i. e. little molecules rusted out, but that the fact it was pitted would not "have affected it if it had not been weakened by crystallization". It appears that the main leaked at some points, not where it burst, however, and leakage shows weakness of threads at the point of the leak. If a pipe is a good grade of pipe crystallization will not occur for years, but in a poor piece of pipe it may happen in a week from vibration and strain. The possibility of crystallization is one of the things that suggests the necessity of constant inspection. Crystallization, says the witness Wishart, "is the same as if we take a piece of wire and bend it back and forth until crystallization takes place and it breaks". There is evidence tending to show that the pipe was rusted and corrugated with slate.

One John Snyder had been master mechanic for Springer at this building for three months, but quit the morning after the accident happened. Mr. Springer tells us he did not tell Snyder that the plant needed a general overhauling but that his, Snyder's, duty was to inspect and report to him, Springer. Snyder testified that while he had no conversation with Springer about this main pipe he did speak to him about the condition of the plant generally and that the plant needed an overhauling in several instances, and to this Springer said: "When we get more tenants we will make a general overhauling and straighten these things up". In his cross-examination however Snyder said that in this conversation with Springer this particular steam line that ran in front of the boilers was spoken of. The evidence shows no inspection or over-

hauling of the steam plant since it was put in. Springer had the affirmative of this proposition and could readily adduce the evidence had there been any inspection. As he showed none the jury could fairly infer that there had been none. The plant was allowed to wear out with the wear and tear of age. The defense is advanced that the particular defect which caused the injury to Barni was not obvious and indicated by leakage at the joint that pulled out—that it was not observable by those who saw the pipe. This may be considered as true but it is not a sufficient defense in a case such as this where there is a duty of active and continuous inspection. To hold such defense sufficient here would be to totally abrogate the active duty of inspection. It was testified to by witnesses for the defense that the probable life of such a steam pipe is twenty to twenty-five years. But in this same connection the witness Wishart testified that the probability of life depends upon the care and attention the pipe receives; that undue vibration might bring on an accident at any time even two hours after the installation of the plant; that where the pipe would be out of square there would the greatest strain be, that the weakest part is where the threads are, and that if a pipe wore out there is where it would pull out. And so it happened here. We cannot escape the conclusion that had the pipe been inspected—overhauled—according to Snyder's request of Springer, then Barni would not have been injured. As it happened Springer did not perform his duty to defendant in error in that respect and did not exercise reasonable care and prudence to furnish him a reasonably safe place in which to work.

The judgment of the Municipal Court will be affirmed.

Affirmed.

Daniel W. Newby, Defendant in Error, v. Swift & Company, Plaintiff in Error.

Gen. No. 14,235.

1. **CONTRIBUTORY NEGLIGENCE**—*when servant guilty of. Held,* under the evidence in this case, that the servant injured while descending a ladder was guilty of contributory negligence which barred his recovery.

2. **MASTER AND SERVANT**—*when appliance not defective. Held,* under the evidence in this case, that the ladder, descending which the servant was injured, was not of such negligent construction as to justify a recovery against the master for an injury sustained by the servant by reason thereof.

Action in case for personal injuries. Error to the Municipal Court of Chicago; the Hon. FREEMAN K. BLAKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1908. Reversed. Opinion filed December 18, 1908.

WINSTON, PAYNE, STRAWN & SHAW, for plaintiff in error.

A. L. GETTYS and FRANK V. CAMPE, for defendant in error.

MR. JUSTICE CHYTRAUS delivered the opinion of the court.

Daniel W. Newby brought this suit in the Municipal Court, by Bennoi Newby, his father and next friend, against Swift & Company, his employer, to recover damages for a personal injury. A trial by jury was had, a verdict in his favor for \$400 returned and a judgment was entered upon that verdict. Plaintiff in error sued out the writ herein to reverse that judgment. We can find no way of justifying that verdict and judgment. The young man when hurt was employed as a carpenter and he had worked in connection with that trade for about a year and a quarter. He worked for Swift & Company at Kensington, Illinois, where they were putting up an addition to an ice

house. He was eighteen years old, and strong. He was injured by falling off a ladder about twelve o'clock noon on December 20, 1906, and at that time had had his position about three months. For two days before he was hurt he had been at work laying a floor in a hay-loft in the building. On the east side of the building there were ten permanent ladders, not slanting but fastened up flush against the building. The ladders were distributed along the side of the building. Each ladder was alongside of a door or, rather, an up and down series of doors, one for each story of the building. The building was forty-seven feet high from the ground to the top of the hay-loft. The hay-loft made a ceiling over the rooms below it. Each ladder consisted of two uprights (the evidence is not clear whether two-by-four or two-by-six) into which the rungs were mortised. The ladders had been made on the ground, and, when completed, two-by-six pieces of wood were nailed across the several ladders at distances of eight feet apart. These two-by-six cross-pieces are claimed to have caused the trouble. When the ladders were nailed up to the side of the building, spikes were driven through these cross-pieces into the wall of the building to hold the ladders in place. These cross-pieces thus came between the ladders and the building and some of them came nearly opposite rungs in the ladders. There is no complaint of the rungs.

When he was hurt Daniel was following another workman down one of the ladders from the loft, in response to the noon whistle. At a distance of about sixteen feet from the ground, when putting his right foot down from one of the rungs, he put the toe thereof on the two-by-six instead of on the rung whereon he intended to step. Then, as he says, when he stepped with his left foot he "fell right straight down".

It appears that the upper edge of the two-by-six, which he says he placed his toe upon, is about four inches above the rung on which he intended to place his foot. In the exercise of reasonable care he must

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have observed that his foot had not reached the rung of the ladder. The rungs, as he says, were about one foot apart in all the ladders. He had gone up and down these ladders several times and had even gone up this particular ladder. The distance between the rungs was not so great but that the difference, when it was lessened by about four inches, must have been noticed in the exercise of due care. Besides his sense of feeling must have informed him that he was not stepping on a rung of the ladder. The rungs of the ladder were somewhere from four to six inches in depth.

Under the circumstances we do not regard the placing of these cross-pieces between the ladder and the building as negligence. We consider that the ladders as constructed were a reasonably safe appliance and the mere fact of injury is not a ground for recovery against a master. The judgment of the trial court is reversed and the cause will not be remanded.

Reversed.

Peoples Gas Light & Coke Company, Appellee, v. City of Chicago et al., Appellants.

Gen. No. 14,088.

ORDINANCES—construction as to frontage consents. *Held*, that a gas reservoir proposed to be constructed was to be located "on" 64th street in the city of Chicago, and that under the terms of the ordinance regulating the right to erect such a building, frontage consents were essential only with respect to said 64th street.

Bill for injunction. Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 21, 1908.

Statement by the Court. The People's Gas Light & Coke Co., May 4, 1907, filed a bill against the City

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of Chicago and Joseph Downey, defendants, praying an injunction to restrain said defendants from in any wise interfering with or preventing, or attempting to interfere with or prevent the construction of a foundation and erection of a gas reservoir on certain property of complainant.

The defendants answered the bill, the cause was heard on the pleadings and on a stipulation of facts and testimony heard in open court and exhibits, and the court, June 24, 1907, found and decreed, in substance as follows: The court finds all the material allegations of the bill to be true; that complainant is a corporation, incorporated under a special act of the legislature of this State, approved February 12, 1855, as amended by special act approved February 7, 1865, and is engaged in the manufacture of gas, etc., and is the owner of certain described lots, which property was acquired by it for the purpose of its business, at an expense of more than \$100,000; that it caused plans and specifications to be made for a gas reservoir, to be erected on parts of lots 3 and 4, in block 10, in Skinner and Judd's subdivision, in the northeast quarter of section 21, township 38 north, range 14 east of the third principal meridian, said gas reservoir having a diameter of approximately 180 feet, to be located at a distance of four feet south from Sixty-fourth street, at its nearest point, and at a distance of over twenty-six feet at its nearest point from Grove avenue, on Sixty-fourth street. Between State street and Grove avenue are the following buildings (exclusive of the reservoir in process of erection) fronting south, three buildings, one residence, one shop and one stable; and fronting north is one building, a residence, owned by complainant, and on the southwest corner of Sixty-fourth and State streets is a saloon, having its entrance on State street.

Sections 1108 and 1111 of the building ordinance of the city of Chicago, known as sections 687 and 692 of the Revised Municipal Code, are correctly set out in the

bill and are as follows: (copying the sections). The court further finds that less than two-thirds of the buildings on both sides of Sixty-fourth street, between State street and Grove avenue, the two nearest intersecting streets, one on either side of the point at which the gas reservoir is to be erected, are used for residence purposes, and that complainant is the owner of more than a majority of the frontage on both sides of Sixty-fourth street between State street and Grove avenue. And the court further finds that complainant submitted said plans and specifications to the commissioner of buildings of the city of Chicago, and requested from him a permit to erect a gas reservoir in the aforesaid location, in accordance with said plans and specifications, and, January 24, 1907, Peter Bartzen, then such commissioner, issued to complainant a permit, in the usual form, to construct the foundations for the gas reservoir, for which complainant paid \$5.00 to said city; and, February 7, 1907, said Peter Bartzen, commissioner as aforesaid, issued to complainant a permit, in the usual form, to erect said gas reservoir, and complainant paid said city therefor \$459.30, but by a clerical error, the block in which the property is was written 9 in said permit, instead of 10, which last was mutually intended. Complainant, subsequently to the issuance of said permits, contracted with Thomas Hayward for the construction of the foundations and the erection of said gas reservoir, for the total price of \$445,000, and said contractor entered upon the construction of said foundations, and has expended more than \$25,000 in said construction. The said foundations are on lots 3 and 4 in block 10, in said Skinner & Judd's subdivision, and are located four feet from Sixty-fourth street, at its nearest point, and more than twenty-six feet from Grove avenue, at its nearest point; and the valve house, used in connection with said reservoir, will be in Sixty-fourth street, and the gas mains running to said reservoir come into said reservoir from Sixty-fourth street, and

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said reservoir is on Sixty-fourth street, and not on Grove avenue. The defendant, Joseph Downey, is now the commissioner of buildings of the city of Chicago, and the defendants, the city and said commissioner, threatened to revoke said permits, and notified complainant and said contractor to cease said work, and that he, said commissioner, would, if necessary to prevent the same, invoke the aid of the police force of the city of Chicago, and, prior to the filing of the bill, the said police actually interfered to prevent the carrying on of said work. Following the foregoing findings, the court decreed, in substance, rectifying the mistake in the permit of block 9 instead of 10, above mentioned, and perpetually enjoining the defendants from revoking said permits, and from, in any manner, interfering with complainant, or said contractor, in continuing the construction of said foundations and the erection of said reservoir.

GEORGE E. DIERSSEN and GEORGE W. MILLER, for appellants; EDWARD J. BRUNDAGE of counsel.

SEARS, MEAGHER & WHITNEY, for appellee; JAMES F. MEAGHER and EDWARD S. WHITNEY, of counsel.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

It is not assigned as error or contended by counsel for appellant, in argument, that the findings of fact by the court are not warranted by the evidence. The contention of appellants' counsel is solely one of law, viz.: that, to entitle appellee to a permit, it must have not only the consent of a majority of the frontage on Sixty-fourth street, between State street and Grove avenue, which it is conceded appellee has, but also a majority of the frontage on Grove avenue. In advancing this proposition, counsel for appellants rely on the following sections of an ordinance of the city of Chicago:

“1108. Whenever in this ordinance a provision is made that frontage consents shall be obtained for the erection, * * * of any building or structure in any block, the word ‘block’, so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding a square which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected * * * unless it shall be otherwise specifically provided”.

“1111. It shall not be lawful for any person or corporation to locate, build, construct or maintain, on any street or alley in the city, in any block in which two-thirds of the buildings on both sides of the street are used chiefly for residence purposes, any building for a * * * gas reservoir * * * without the written consent of a majority of the property owners according to frontage on both sides of said street or alley.

“Such written consent shall be obtained and filed with the Commissioner of Buildings before a permit is issued for the construction of any such building. Provided, that in determining whether two-thirds of the buildings on both sides of the street are used chiefly for residence purposes, any building fronting upon another street and located upon a corner lot shall not be considered”.

Sixty-fourth street is an east and west street, and State street and Grove avenue lie north and south, and are the nearest intersecting streets to the place where the gas reservoir is located, State street lying east and Grove avenue west of that place. The proposed gas reservoir will be circular in form. Its nearest point to Sixty-fourth street will be four feet south of the south line of Sixty-fourth street, and its nearest point to Grove avenue more than twenty-six feet east of the east line of Grove avenue. By section 1111, above quoted, it is provided: “It shall not be lawful for any person or corporation to locate, build, construct or maintain, on any street or alley in the city, in any block in which two-thirds of the buildings

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on both sides of the street are used chiefly for residence purposes, any building for a gas reservoir, without the written consent of a majority of the property owners, according to frontage, on both sides of said street or alley”.

The word “on” in the phrase “on any street or alley in the city”, evidently means fronting on or next to any street or alley. If a building were constructed, fronting on Sixty-fourth street, four feet from the street line, and of width equal to the diameter of the proposed reservoir, it could not be contended that it was not on the street, within the meaning of section 1111. The word “block”, as used in the ordinance, is defined by section 1108 as not meaning a square, but as embracing “only that part of a street bounding a square which lies between the two nearest intersecting streets”. This definition applies very clearly to that part of Sixty-fourth street within four feet of which the gas reservoir is located, and which lies between the two nearest intersecting streets, State street and Grove avenue, and is not in the least applicable to the part of Grove avenue between Sixty-fourth and Sixty-fifth streets, on which part of the street the reservoir is not located. The concluding language of section 1111 is: “Provided, that, in determining whether two-thirds of the buildings on both sides of *the* street are used chiefly for residence purposes, any building fronting upon another street, and located on a corner lot, shall not be considered”. In view of this provision, if there were a building on the southeast corner of Sixty-fourth street and Grove avenue, fronting on Grove avenue and extending back next to the south line of Sixty-fourth street, it could not be considered in estimating the frontage. This emphasizes the view that the frontage which is to be considered is that on the part of street next to or fronting on which the gas reservoir is located, viz., Sixty-fourth street.

We think it plain that under the ordinance the appellee is only required to have the consent of a ma-

jority of the property owners, according to frontage, on both sides of that part of Sixty-fourth street between State street and Grove avenue. Counsel for appellant, in their argument, say: "It is conceded that appellee is the owner of a majority of the frontage on both sides of Sixty-fourth street, and, if permitted to continue the frontage on Sixty-fourth street with its frontage on Grove avenue, then appellee still has a majority on both streets". But the court found, and the finding is not questioned, "that less than two-thirds of the buildings on both sides of Sixty-fourth street, between State street and Grove avenue, the two nearest intersecting streets, one on either side of which said gas reservoir or holder is to be erected, are used for residence purposes", so that appellee requires no frontage consents on Sixty-fourth street.

The decree will be affirmed.

Affirmed.

Louis Craney, Appellee, v. Ernest Schloeman et al.,
Appellants.

Gen. No. 14,093.

1. LICENSEES—*who not mere.* A person who enters upon premises upon which an auction is to be conducted, for the purpose of purchasing at such auction, is not a mere licensee but is upon such premises by implied invitation.

2. CONTRIBUTORY NEGLIGENCE—*when person standing in horse auction ring not guilty of, as a matter of law.* Held, under the evidence in this case, that it was for the jury to determine whether a person injured while standing in an auction ring where horses were being exhibited prior to sale, was in the exercise of ordinary care.

3. PRACTICE—*when general objection will not avail.* A general objection will not reach the irresponsiveness of an answer.

4. INSTRUCTIONS—*when modification requiring knowledge in plaintiff of warning sign, proper.* Held, that the modification of the following instruction by the insertion of the italicized words, was proper:

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"You are instructed that if you believe from the evidence that at the time of the injury to the plaintiff there was displayed conspicuously in the ring in question a sign reading as follows: 'Do not stand in the ring. Persons standing in this ring do so at their own risk'; and that the plaintiff knew of said sign, and that the plaintiff received his injuries while standing in the ring in question, then you are instructed that the plaintiff cannot recover and your verdict must be for the defendants."

5. VERDICT—*when not excessive.* A verdict for \$3,500 rendered in an action for personal injuries is not excessive where it appears that plaintiff suffered as a result of the accident three fractured ribs, contusions to the back, stomach trouble, pleurisy, pain, etc.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 21, 1908. Rehearing denied January 7, 1909.

WINSTON, PAYNE, STRAWN & SHAW, for appellants;
JOHN D. BLACK, of counsel.

MILES J. DEVINE, for appellee; JOHN T. MURRAY, of counsel.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$3,500, recovered in an action on the case by appellee against appellants. The Union Stock Yards and Transit Company of the city of Chicago owns a building in said city, in which is a large arena surrounded by stationary seats, used for conducting auction sales of horses, which that company permits persons to hold. The size of the arena is variously estimated by the witnesses at sixty to eighty feet from south to north and from twenty-five to thirty feet from east to west. There are tiers of seats around the ring in which the horses are exhibited; these tiers rise gradually from the front backwards and are easy of access from the floor of the ring. On each side of the ring where the horses are exhibited, and near the centre of the ring, are two posts extending from the floor to the roof, and

the auctioneer's box is between the two posts on the east side of the ring. The defendant, Ernest H. Schloeman, was in the horse commission business and, on Tuesday, August 5, 1902, he had the use of the premises mentioned, for the purpose of selling horses at auction, and his sale commenced about 11:30 o'clock in the forenoon of that day. The plaintiff, Louis Craney, was engaged in the teaming business and went to the auction sale that day for the purpose of buying a horse. He was standing at one of the posts on the east side of the ring, near the auctioneer's box, when a blind horse, which was being led in the ring, broke away from its leader and ran against plaintiff, crushing him against the post and seriously injuring him.

The propositions argued by appellants' counsel are, that plaintiff, in attending the sale, was a mere licensee, and took his license subject to the manner in which the business was conducted; that plaintiff was guilty of contributory negligence; and that the trial court erred in its rulings on evidence and instructions. The plaintiff was not, in going into the auction room, a mere licensee. There was an implied invitation by the defendant Schloeman, to all persons desiring to purchase horses to attend the auction. Schloeman was engaged in selling horses at auction, and the plaintiff attended the sale for the purpose of purchasing a horse. The business, therefore, which was being carried on, was one in which the plaintiff and Schloeman were mutually interested. In *Pauckner v. Wakem*, 231 Ill. 276, the court distinguishes between a mere licensee and "one who comes on the premises of another by invitation express or implied", and says, "An implied invitation means more than a mere license—means that the visitor was there for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on". *Ib.* 281.

In *Hart v. Washington Park Club*, 157 Ill. 9, the

plaintiff attended a public exhibition of horse-racing given by the club, and was injured by a runaway horse attached to a vehicle. Held, that the plaintiff was entitled to recover, the court saying, among other things: "If an owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them, or in their use for the purpose for which the invitation was extended". Citing cases. See, also, Calvert v. Springfield Light Co., 231 Ill. 290, and 1 Thompson on Law of Neg., sec. 968. The only case cited by appellants' counsel in support of their contention is Bentley v. Loverock, 102 Ill. App. 166. The case is not, in the least, in point. The plaintiff in that case was the representative of an insurance company, and went into a place on the defendant's premises without invitation, express or implied, of his own volition, and solely in the interest of the insurance company. The basis of the contention that the plaintiff was guilty of contributory negligence is the claim that there was a sign in front of the auctioneer's box, reading, "Do not stand in ring; persons standing in this ring do so at their own risk", and that, notwithstanding this sign, the plaintiff stood in the ring, next a post, as hereinbefore mentioned. The evidence is conflicting as to whether there was such a sign at the time of the accident. The plaintiff testified that there was not, and there is no evidence that, if there was such sign, he knew of it; also that if there was such sign, it was customarily and persistently disregarded, with the permission of the defendants. Mr. Schloeman, defendant, testified: "It was customary for the men who wanted to buy horses to be in the ring, the object being to get close to a horse, to see what kind of a horse he is, to see whatever defects may be on him, and they cannot do that very well from a seat".

There is no conflict in the evidence that, at the time of the accident, there were a number of men standing in the ring while the horses were being exhibited. Higgins, witness for plaintiff, and in Schloeman's employ at the time in question, testified that there were from 100 to 150 men standing in the ring when the accident happened.

Arthur O'Neil, clerk at the auction, called as a witness by defendants, testified that the "ring was crowded with people that day of the sale". There is other evidence to the same effect. It was a question for the jury, whether, in view of this evidence, plaintiff did not exercise ordinary care. The horse which injured the plaintiff was blind. He was led by a halter into the ring by one Anderson, who was in Schloeman's employ, and was turned over by Anderson to Michael G. Higgins, also in Schloeman's employ, whose duty it was to lead the horses round the ring.

Anderson testified that he told Higgins, when he delivered the horse to him, to be careful with him, that, "he was off in the eyes". That this information and caution were proper is shown by Mr. Schloeman's evidence. He testified: "A blind horse is liable to run into anybody, or into the auctioneer's stand; that is the reason I give them precaution to be careful—the men that handled the horses down in the ring, Mr. Ramp and Mr. Higgins, the man that led the horse; I told them to be careful, out of the auction box. I told Mr. Ramp to be careful". Ramp was Mr. Schloeman's ringman, and it appears from the evidence that it was his duty to drive the horses, while they were being led, round the ring. Higgins, after testifying that Anderson told him that the horse was blind and cautioning him to be careful, testified as follows: "I examined the horse and I noticed that the horse was totally blind. I led the horse to the centre of the ring and Mr. Schloeman, the auctioneer, was in the auction box, and Mr. Ramp said that the

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horse is sound and right except a little off in the wind, and I says to Mr. Ramp; 'The horse is blind', and Mr. Ramp says to me: 'Keep your mouth shut; take a short hold of him and don't mind'. So I went and winded the horse to the best of my ability. He said he was sound and right except a little off in the wind. I got a short hold of the horse's head and led him to the centre of the auction ring. I led the horse north for to wind him. I turned him once and went south three successive times. Mr. Ramp was whipping the horse. I had the check on him and I had the rope attached to that. The halter check would be two and one-half feet and the rope would be three feet. I told Mr. Ramp, says I, 'Ease up on the horse'. Mr. Ramp as a rule don't pay much attention to me. * * * I was just losing control of the horse when I told him to keep the whip off the horse. He kept whipping the horse. I was coming on up and I lost control of the horse down the centre of the ring. The horse got away from me and he was going right straight south. I had him by the head and I lost control of him and I ran into the end of the room, and while I hung onto the horse, the horse got off at an angle and ran right into this man Craney and doubled him up against a post and he kind of moaned round and swooped right down and fell onto the platform right in line with the auction box. As the horse fell backwards I lost control of the horse. I couldn't hold him". This witness also testified, "I spoke to Mr. Ramp four or five times. I told him the horse was blind. I told him not to light on the horse—whip him up, I was losing control of the horse, and he says, 'Never mind, take a short hold of him, go ahead and wind him'."

O'Brien, witness for plaintiff, testified that the horse was being whipped, and Mr. Craney, the plaintiff, testified: "Mr. Ramp was whipping him all the time, he was whipping him most of the time; * * * I saw him hit the horse, and saw the horse break

loose from the other man. * * * I have seen them whip all kinds of horses; but I have not seen them whip as bad as this one”.

Ramp denied whipping the horse. Piso, for defendant, testified: “Nobody in the ring hit him with a whip. We never hit a blind horse. Mr. Ramp did not hit him that I know of”. Hayden, called by defendant, testified: “I saw Mr. Ramp in the ring this day in question. He was ring-master. He was whipping the horses. I did not see him whip this gray horse. I did not see him whip the blind horse”.

Our conclusion from the evidence is, that it was a question for the jury to decide, from all the evidence, whether the horse was whipped by Ramp, the servant of the defendant, Schloeman, and whether the whipping was negligence and the proximate cause of the injury to the plaintiff. This, certainly, is not a question of law on the evidence, nor can we say that the verdict is contrary to the evidence. Anderson was questioned and answered as follows:

“Q. Did you hear any one, that day, when this horse was brought out, say that this horse was blind?

A. I was the one that told Mr. Higgins to be careful of him, that he was off in the eyes.”

The answer is not strictly responsive; but counsel objected merely generally, specifying no ground of objection. We do not think the court erred in overruling the objection.

The Court: “Did any one beside you say anything about that horse, and, if so, who was it?

A. There was nothing mentioned about the horse being blind to me. I told Mike Higgins to be careful, that he was off in the eyes, and I took the horse Mike Higgins had and gave him this one”.

Counsel moved to strike out the answer, stating no reason for the motion, and the court overruled the motion. We perceive no reversible error in the ruling. The foregoing answers could not have prejudiced defendants. It is not controverted that the horse was

blind, and the defendant, Schloeman, himself, testified that he had cautioned Ramp and Higgins to be careful, as the horse was blind.

The following question was asked Higgins and answer made:

“Q. What, if anything, did you say to him, Anderson, after he got the horse?

A. Anderson told me the horse was totally blind, and to look out for him, that he would step on me”.

Counsel objected generally to the question and the objection was overruled. The ruling is not reversible error.

The plaintiff asked the following instruction, except the words italicized, which the court modified by inserting the italicized words, and gave it as modified:

“You are instructed that if you believe from the evidence that at the time of the injury to the plaintiff there was displayed conspicuously in the ring in question a sign reading as follows: ‘Do not stand in the ring. Persons standing in this ring do so as at their own risk’; *and that the plaintiff knew of said sign*, and that the plaintiff received his injuries while standing in the ring in question, then you are instructed that the plaintiff cannot recover and your verdict must be for the defendants”.

The instruction as asked was bad, and the modification was proper.

Objection is made to two instructions in respect to the care which the plaintiff should have exercised, and in respect to whether he failed to exercise reasonable care. These instructions are substantially included in five instructions given at the request of the defendants, to which we cannot refer by numbers, as the instructions are not numbered, as they should be.

Lastly, it is urged that the damages are excessive.

The post against which the plaintiff was crowded by the horse was a rough timber post eight by eight or ten by ten inches in lateral dimensions, supporting the roof of the structure, and the weight of the horse, as

testified by one witness, was 1,300 pounds and by another 1,400 pounds. Dr. Flanagan testified that he was called to the Stock Yards to attend plaintiff, at the time of the accident, and, on the examination, found that he had three fractured ribs on the left side and contusions on his back, and was suffering great pain; that the fractures were alongside the sternum, and that he, witness, at that time gave him a little stimulant and immobilized his side as well as he could with bandages and adhesive plaster; and that he saw him again about two weeks after the accident, and had seen him since the accident, in all about twenty times, and examined him about four days before giving his testimony, and found that his third and fourth ribs were not united as well as they should be, and that, in his opinion, they would never be any better. He further testified that, two weeks after the accident, he treated plaintiff for cough and stomach trouble, and examined his chest and diagnosed his complaint as pleurisy, and that the pleurisy resulted from the accident.

Doctor McGregor testified that he examined plaintiff in the latter part of July, or in August, 1903, and also the day before he testified, and found that there had been a separation of the sternal ends of the ribs, and that the indication was that the ligaments which hold the ribs to the sternum had been torn and had not united, and that, in his opinion, the condition would be permanent, and would affect plaintiff in the movement of his chest and arms, and would limit his ability to work, and would cause pain if he worked.

The evidence shows that before the accident plaintiff was a very strong man, could lift heavy weights and was healthy, and that, since the accident, he has been weak and cannot work or lift as formerly. We do not feel warranted in disturbing the jury's assessment of damages.

The judgment will be affirmed.

Affirmed.

John F. Devine, Administrator, Appellee, v. National Safe Deposit Company, Appellant.

Gen. No. 14,099.

1. **PRESUMPTIONS—*against suicide.*** With respect to a man well-conditioned in life, the presumption is against his having committed suicide.

2. **ORDINARY CARE—*what evidence of, in absence of eye witness.*** Where there was no eye witness to an accident resulting in death, the testimony of those who had known the deceased, to the effect that he was careful, steady and industrious, is evidence tending to prove the exercise of ordinary care by such deceased at the time of his death.

3. **CONTRIBUTORY NEGLIGENCE—*effect of proof of knowledge of danger.*** Prior knowledge of a defect, as in this case that a door to a platform was open and the opening unguarded, is not, as a matter of law, conclusive that a person having such knowledge was not in the exercise of ordinary care.

4. **LICENSEES—*who not mere.*** A person in the employ of another to whom a portion of premises has been demised, in going upon such premises in connection with the performance of his duties as such an employe, is not a mere licensee to whom the person in control of such premises owes no duty.

Action in case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook county; the Hon. HOMER ABBOTT, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 21, 1908.

HORTON, BROWN & MILLER, for appellant.

JAMES C. McSHANE, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellee, claiming that the death of his intestate, William Thomas Daly, was caused by the negligence of the appellant, sued appellant in case. The jury rendered a verdict finding the defendant guilty and assessed the plaintiff's damages at the sum of \$6,000. The court overruled the motions by the defendant for a new trial and in arrest of judgment, and rendered judgment on the verdict.

The defendant, the National Safe Deposit Company, owns and controls an office building, known as the First National Bank building, situated at the northwest corner of Monroe and Dearborn streets, in the city of Chicago. The building is eighteen stories in height, and extends along Monroe street, an east and west street, 232 feet, and north along Dearborn street, a north and south street, 191 feet to an alley. The alley extends west from the west line of Dearborn street and next to and adjoining the north wall of the building. The east 83 feet of the west end of the alley is 13 feet wide, and the part of it west of said 83 feet is 28 feet wide. The south 10 feet and 10 inches of the alley abuts on a cement platform, the surface of which is about two feet above the surface of the alley, and is level and smooth. The platform is 23 feet, 9 inches long from east to west, and 10 feet, 10 inches wide from south to north. About 14 feet, 6 inches (as appears from the scale of a plat in evidence) from the east line of the platform, there is an opening in it. The south line of this opening is next to the north wall of the building, and the opening is 6 feet, 3 inches from south to north and 4 feet, 5 inches from east to west. The opening has a double iron door, one side of which is hinged on the north and one on the south side of the opening. When the door is open its south side leans against the north wall of the building and its north side against a garbage box, which is on the platform. The door when closed is on a level with the surface of the platform and forms, substantially, a part of it. Defendant had provided a wooden bar 2 by 4 inches in dimensions, to protect the east side of the opening when the door is open. The bar is fastened to the north wall and rests, when up, on a garbage box at the north side of the opening, where a 2 by 6 is nailed, and is about 2 feet above the platform floor. For an hour before the accident the door of the space was open and the space unguarded. The opening is for the operation of an elevator, from the platform down to the basement, where the engine

room is and *vice versa*. About 3 feet, 2 inches east of the east side of the opening there is a steel rolling door in the north wall of the building, 8 feet, 9 inches wide, and 9 feet, 2 inches high, which opens into a corridor 10 feet wide, which extends south into the building about 114 feet, 6 inches, at the south end of which there is a freight elevator, used for the purpose of hoisting articles to the floors above and *vice versa*. The door to the corridor is the only entrance to the building at its rear or north side. The platform, door, corridor and freight elevator are used by the tenants of the building in removing things to and from the building. The number of tenants in the building runs up into the thousands. The defendant leased to the Amberg File & Index Co. a room on the 14th floor of the building, for a term commencing May 1, 1905, and ending April 30, 1906. This room the Amberg Co. used as a show room for its letter-file goods. The company had a factory or plant at 435 Fulton street, in the city of Chicago, about 2 1/2 miles from defendant's building.

Plaintiff's intestate had been in the employ of the Amberg Co. about two years. His business in the winter was to run the heating plant at the factory, and during the remainder of the year he acted as outside janitor. He locked up the company's building at night, and, in the summer, he looked after the company's yards and lawns at its plant. The company paid him ten dollars per week and house rent, and furnished him a flat and heat and light. He was thirty-seven years of age at the time of his death, and left surviving him his widow and three children, who, at the time of his death, were aged, respectively, one, eight and eleven years.

On the morning of May 9, 1905, the Amberg Co. sent from its factory, by wagon, a load of goods to the defendant's building, to be placed in its show room. Daly, plaintiff's intestate, Elmer E. Sisson, in the employ of the company, and Daly's little boy, Johnnie,

then about eight years old, accompanied the driver of the wagon, August Axelman. When the wagon was driven into the alley there was a team standing in the narrow part of the alley and several grocery wagons further west, and a large wagon was backed against the platform, from which a safe was being unloaded, so that the Amberg Company's men were prevented from reaching the platform for about an hour. When the men who were unloading the safe got it off the wagon, they took it south through the corridor to the freight elevator, leaving their team at the platform, and then Sisson directed Axelman, the teamster, to get on the wagon, saying that he, Sisson, would lead the team, attached to the wagon, from which the safe had been unloaded, out of the way. At that time Daly and Sisson were on the platform, and there was a plank 2 by 10 or 12 inches and 12 or 14 feet long, the west end of which rested on the platform and the east end on the alley. This plank was in such a position that the wagon could not, unless it should be removed, be placed alongside the platform, where it was desired to place it for unloading. Sisson walked down this plank to lead the team at the platform out of the way, and as he was walking down the plank, Daly, who was on the platform, said, "I will pull in the plank". Sisson led the other team east, out of the way, and then the wagon driven by Axelman was backed in alongside the platform, and when Sisson went onto the platform to help unload, he discovered that Daly and the plank had disappeared. The other men then unloaded the wagon and took the load up to their employer's room, and Daly was subsequently discovered on the basement floor, to which he had fallen, and when brought up he was dead.

The defendant introduced no evidence. The contentions of its counsel are (1) that Daly, at the time of the accident, was not exercising ordinary care; (2) that the accident resulted from an obvious defect, known to the deceased; and (3) that the deceased

was a mere licensee, and the law does not impose on the owner of premises the duty of providing a safe place to work, for persons going on the premises for their own purposes. There was no witness of the accident. Defendant's counsel claim that Daly's little eight-year-old boy, Johnnie, saw it; but this claim is not sustained by the evidence. The presumption is against suicide, and especially so in the case of the deceased. He was only thirty-seven years old at the time of his death; he had a good place, good wages, was well taken care of by his employer, and had a wife and three young children dependent on him. That he was attached to his children is evident from the fact that he took his little boy along with him to the building. Mr. Patterson, superintendent of the Amberg File & Index Co., who hired Daly, and Sisson, Daly's fellow workman, who had known him for two years, both testified that he was a careful, steady and industrious man. Mr. Patterson also testified that Daly was trusted to lock the factory building every night. This is evidence that the deceased was exercising ordinary care at and about the time of the accident. C. & E. I. R. R. Co. v. Beaver, Adm'r., 199 Ill. 34; C. & A. Ry. Co. v. Wilson, Adm'r., 225 *ib.* 50. In the last case the court say: "Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, at the time of the accident, was not guilty of negligence may be shown by her habits, and by what are known to be the instincts of self-preservation, in persons possessed of their natural faculties, and who are ordinarily sober and careful of their personal safety". Numerous other cases are to the same effect.

The evidence that the deceased was careful, steady and industrious was proof, *prima facie*, that he was exercising ordinary care at the time of the accident, and, in the absence of evidence to the contrary, is sufficient to warrant a finding that he was exercising ordinary care.

Defendant's counsel, however, contend that the deceased knew, before the accident, that the doors of the space in the platform were open and the open space unguarded. The evidence shows that during the hour before the accident the door of the space was open and the space unguarded by the bar. Daly was there on the 8th day of May, the day next before the day of the accident, with Sisson, and saw that the door in the platform was open, and the bar not up, and Sisson said to him, that "it would be a fine place for a fellow to fall down and break his neck", and Daly said, "Yes, it would be". Also, on the day of the accident, and before the accident, while the men were waiting for an opportunity to unload the wagon, Daly was on and around the platform, and could not, as we think, have failed to observe that the space in the platform was open and unguarded. Counsel for defendant rely on this prior knowledge of the deceased as overcoming the evidence that he was a careful, steady and industrious man. There are numerous authorities that prior knowledge of a defect, which caused an injury, is not, as matter of law, conclusive that the person injured was guilty of contributory negligence, or did not exercise ordinary care; but that the question is one of fact, to be passed on by the jury. *Bond v. Smith*, 44 Hun 219, 223; *Atkinson v. Abraham*, 45 Hun 238; *Cassidy v. Angell*, 12 R. I. 447; *Bassett v. Fish*, 75 N. Y. 303; *City of Streator v. Chrisman*, 182 Ill. 215, 217; *Weed v. Village of Ballston Spa*, 76 N. Y. 329; *Looney v. McLean*, 129 Mass. 33; *Udwin v. Sperkel*, 136 Ill. App. 155, 159; and cases cited.

Defendant's counsel rely on *E. St. L. etc. Co. v. Crow*, 155 Ill. 74, in support of the proposition that the deceased did not exercise ordinary care. But that case is clearly distinguishable from the present, in respect to the question of ordinary care. In that case there was absolutely no evidence that the plaintiff, Crow, was exercising care at the time of the accident, as the court in the opinion say, using this language:

“Appellant insists that there was no evidence before the jury fairly tending to prove due care, on the part of the plaintiff, to avoid the injury for which he sues, and for that reason its request to instruct them to find for the defendant should have been given. We have carefully examined all the evidence in this record, and are unable to deduce from it a satisfactory answer to this contention”.

In the present case there is evidence proving *prima facie* the exercise of ordinary care by the deceased.

The 2nd and 3rd propositions of defendant's counsel, which we can hardly think are advanced seriously, that the deceased was a mere licensee, and there was no duty incumbent on the defendant to keep the place where the accident occurred in a reasonably safe condition, we will consider briefly and together. The defendant leased to the employer of the deceased, the Amberg File & Index Co., a room on the fourteenth floor of its building; the only way in which that company could take its goods to that room was by unloading them on the platform, taking them through the corridor, south to the freight elevator, and hoisting them by means of the elevator. Therefore, the defendant, in executing the lease to the Amberg Co., authorized the use by the company of that way. Had the defendant prevented such use, it would have been to prevent the enjoyment of the premises by the Amberg Co., and an eviction. The defendant had the direct and exclusive control of the platform, corridor and freight elevator, and, therefore, it was its duty to exercise reasonable care to keep them in reasonably safe condition for the purpose for which they were intended. If the owner of a building leases different apartments in the second story of the building to different tenants, for residence purposes, the sole means of approach to which is by a flight of stairs, in the sole control of the owner, can it be said that the tenants are mere licensees, that the owner owes no duty to keep the stairs in a reasonably safe condition,

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and that if, by reason of a dangerous defect in the stairs, one of the tenants is injured, while using ordinary care, there can be no recovery? The law is otherwise. *Shoninger Co. v. Mann*, 219 Ill. 242, 245, and cases cited. Counsel for defendant do not, in their argument, contend that the defendant was not guilty of negligence, and it is plain from the evidence that it was negligent in not guarding the space in the platform, when the door was open, by means of the bar provided for that purpose, or otherwise.

The judgment will be affirmed.

Affirmed.

Arthur W. McGovney, Appellee, v. Village of Melrose Park, Appellant.

Gen. No. 14,105.

FEES AND SALARIES—*what not within power of village.* A village appointing an attorney must definitely fix his salary; such village has no power to authorize the rendition of services upon the basis of the usual and customary charges.

Assumpsit. Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the October term, 1907. Reversed. Opinion filed December 21, 1908.

THATCHER, GRIFFEN & WRIGHT, for appellant.

JOHN H. BATTEN, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in a suit by appellee against appellant, to recover compensation for services performed by him as attorney for appellant. The declaration consists of the common

counts, to which appellee pleaded the general issue. The appellant, at the close of the evidence, moved the court to instruct the jury to find for the defendant, and presented an instruction to that effect, but the court denied the motion. The jury found for appellee and assessed his damages at \$600, and the court overruled appellant's motion for a new trial and rendered judgment on the verdict.

Appellee was appointed village attorney, at a meeting of the trustees of the village, held May 9, 1904. At a meeting of the trustees held April 27, 1905, appellee's resignation, to take effect May 1, 1905, was presented and accepted.

The board of trustees, June 11, 1900, passed and the president of the board approved an ordinance creating the office of village attorney, providing for the appointment of such officer annually and prescribing his duties. Section 8 of the ordinance is as follows:

"Section 8. The compensation of such village attorney shall be and is hereby fixed at the sum of four hundred fifty dollars per annum, Provided, that in all special tax or assessment cases, carried into courts of record and in all cases in the state courts of record and the courts of the United States in which the village may be a party plaintiff or defendant, such village attorney shall be allowed the usual and customary fees of attorneys practicing in such courts over and above and besides such sum herein fixed and determined as and for his salary".

Appellee's claim is for services performed by him for the village by special agreement, while he was village attorney, all of which services pertain to the official duties of such attorney. He testified that, at a regular meeting of the village board of trustees, held in the latter part of June, 1904, it was moved and carried that he should take charge of special assessments numbers 58, 64, 65 and 66, and do the legal work, and that he be paid what the same is reason-

ably worth, and that he performed the necessary work, in accordance with the motion.

It appears from appellant's testimony that all the assessments above mentioned had been confirmed at the time of said motion, and the main work for which he claims compensation was drafting contracts for the making of the improvements for which the assessments were levied and drafting the contractor's bonds. The drafting these contracts and bonds, and doing other work in relation to the assessments, after they had been confirmed, are not within the meaning of the provision in section 8, quoted *supra*; but this, in our view, is not necessary to the decision of the cause. The village of Melrose Park is incorporated under the general law for the incorporation of cities and villages. Section 11 of article 11 of that act is as follows:

"Sec. 11. The president and board of trustees may appoint a clerk *pro tempore*, and whenever necessary to fill vacancies; and also may appoint a treasurer, one or more street commissioners, a village marshal, and such other officers as may be necessary to carry into effect the powers conferred upon villages, to prescribe their duties and fees, and require such officers to execute bonds as may be prescribed by ordinance". Hurd's Rev. Stat. 1905, p. 315.

The section is the same as originally passed, with the exception that the words "village marshal" are substituted for "village constable".

Section 15 of article 6 of the act is as follows:

"Sec. 15. All other officers may receive a salary, fees or other compensation to be fixed by ordinance, and after the same has been once fixed, such fees or compensation shall not be increased or diminished, to take effect during the term for which any such officer was elected or appointed; and every such officer shall make and return to the mayor, or president of the board of trustees, a semi-annual report, verified by affidavit, of all such fees and emoluments received by him". Hurd's Rev. Stat. 1905, p. 307.

By this section the board of trustees is limited to fixing the salary of the village attorney by ordinance. "Fixing", as used in the section, can only mean making definite and certain. This is apparent from the words following, "such fees or compensation shall not be increased or diminished, to take effect during the term for which any such officer was elected or appointed". Manifestly, unless the compensation be a sum certain, it cannot be told whether it has been increased or diminished.

By section 8 of the village ordinance, appellee's compensation or salary was fixed at \$450 per annum. By section 15 of article 6 of appellant's charter, quoted *supra*, that salary could not be increased so as to take effect during appellee's official term; but, by the provision of section 8 of the ordinance, it is provided that the compensation may be increased an indefinite amount. In other words, section 8 of the ordinance provides for the doing of that which appellant's charter expressly prohibits. The provision is illegal and void. The charter provision prohibiting increase of an officer's compensation, to take effect during his official term, is so important that it is incorporated in the constitution in respect to the compensation of state and county officers. The salary of the village attorney, fixed at the sum of \$450 per annum by the ordinance, includes compensation for the performance of all said attorney's official duties, and appellee rendered no services for the village not within the sphere of his duties as village attorney. No claim is made by appellee that his salary has not been paid in full.

The court erred in denying appellant's motion to instruct for the defendant. There are other reversible errors in the record, which, in view of our conclusion that there can be no recovery, it is not necessary to refer to.

The judgment will be reversed.

Reversed.

George A. Winn, Appellee, v. Edwin C. Walker, Appellant.

Gen. No. 14,112.

1. *INSTRUCTIONS—when should be particularly accurate.* Where a case is close upon the evidence the instructions should be drawn with special accuracy.

2. *INSTRUCTIONS—when inaccurate, not subject to cure.* An instruction which authorizes a verdict if certain facts are believed, which facts do not in law justify such a verdict, is not susceptible of being cured by another correct instruction.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook county; the Hon. GEORGE A. CARPENTER, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed December 21, 1908.

A. BINSWANGER, for appellant.

ADAMS & FROELICH, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This cause was tried in the Circuit Court, on appeal from a judgment recovered before a justice of the peace. The jury found for appellee and assessed his damages at the sum of \$200, and judgment was rendered on the verdict. The appellant is a stock broker, and, about February 1, 1906, appellant, by appellee's order, purchased for appellee 100 shares of the stock of the United States Steel Company, at \$44 5/8 per share. The stock was sold by appellant August 17, 1906, for \$43 1/2 per share, and appellant sent a check for the purchase money less appellant's commissions, to appellee, which appellee received and cashed. Appellee's contention is that the shares were sold contrary to his instructions to appellant's manager, Mr. Joseph M. Horine, and appellant contends the contrary. Appellee testified, in substance, that after the purchase of the stock for him, the market price of

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shares fell as low as \$32 per share, and that he kept putting up margins with appellant, until he had put up \$1,900; that just before August 1, 1906, he went to appellant's office, and told Mr. Horine that he was going to Capitol Island, Maine, where he would probably remain during the month of August, and that, in case steel should go down more, he, appellee, would take it up and pay the difference between the margin of \$1,900 and \$3,300 or \$3,400, and take the stock and put it in his vaults, and that he left nothing to appellant's discretion; that he, appellee, went east to the State of Maine about August 1, 1906, and remained there till about the 25th or 26th of that month, and while there he watched the market every day, and that, about August 10th, the market price of the stock was increasing, and that, about August 27th, the market price was \$48 per share. Appellee further testified as follows: August 27th he telegraphed to appellant from Boston, Massachusetts, to sell the stock if it should go back to 45 1/2. August 28th or 29th he received, in New York, the following telegram from appellant:

"CHICAGO, August 17/06.

GEORGE A. WINN, City.

DEAR SIR:—We have this day sold for your account and risk, subject in all respects to the rules, by-laws and customs of the New York Stock Exchange, where executed, 100 shares of steel at 43 1/2.

Respectfully yours,
WALKER & COMPANY".

In answer he sent this letter:

"HOTEL VICTORIA, August 29, 06.

JOE: Received here a notice from your house stating that they had sold my steel at 43 1/2. Why?

GEORGE WINN."

He received the following letter, dated Chicago, August 31st, addressed to him, at Philadelphia, in reply to his of August 29th:

"Geo.: Not knowing where to reach you could not

advise you as to action taken on steel com., which in light of subsequent quotations looked like a poor move, but some of the strongest advices (one of which I enclose herewith) came in that day backed up by heavy liquidation, and my judgment was to get out as you had stated you did not care to get hung up again. It was within a point of where you bot and it looked like poor judgment to stand for another big loss. Sorry, old man, but will try and make it up on something in the future. Yrs.,

HORINE."

Enclosed in that letter was the following:

"Private Wire. Walker & Co., August 17, 1906.

If you have any friends in steel, get them out. The ore deal will cause more trouble than Northern Securities, and the stock will have a good break. J. B. Walker".

Appellee, September 5th, wrote to Mr. Horine, from Cleveland, Ohio, this letter:

"Your letter received. I consider it only just for you to put me back at the point you sold me out, or credit my account at figures I authorized you to sell, 45 1/2.

GEORGE WINN."

Subsequently appellee saw Mr. Horine and renewed the request made in the last letter, which Horine refused.

Mr. Horine, appellant's manager, with whom appellee dealt, testified, in substance, as follows: When the market went down in the neighborhood of 32 5/8, appellee had a number of conversations with him; that he wanted to get out of the market, and he, Horine, advised him to take the stock and pay for it, which appellee declined to do, saying that he did not want to tie up any more money, and he said, "If it goes up near where I bought it, and starts down, I want you to get it out of the market. I don't want to stand for it". Appellant claims that this was an instruction from appellee to sell the stock if it went

down nearly to the price at which it was purchased, and says that on the day the stock was sold the price had begun to decline.

The case is exceedingly close on the evidence, and, therefore, the instructions should be accurate and not likely to mislead the jury. *Swan v. The People*, 196 Ill. 610. The court gave to the jury this instruction, at appellee's request:

"The jury are instructed that it is the duty of a broker to obey his client's instructions, and in this case, if the jury believe from the evidence that no authority was given to the defendant to sell or cause to be sold the 100 shares of stock in question for \$43.50 per share; and if the jury further believe from the evidence that such sale by said defendant was not thereafter ratified by the plaintiff, then the jury are instructed that the defendant is liable to the plaintiff for any losses, if you believe any has been shown by the evidence to have been sustained by the plaintiff by reason of such sale".

The appellant did not claim, nor did Mr. Horine testify, that appellee gave instruction to sell the stock at \$43.50 per share. Horine's testimony is that appellee's instruction to him was that if the market went up nearly to the price at which the shares were purchased, and started down, to get him out of the market; in other words, to sell. The instruction authorizes a finding for appellee, if the jury does not believe that appellant was specifically authorized by the plaintiff to sell the stock for \$43.50 per share. The instruction was calculated to mislead the jury, and we cannot know that it did not mislead them. It is insusceptible of cure by any other instruction, because it authorizes a finding for appellee "if the jury believe", etc., and the jury may have been guided solely by the instruction, without considering any other instruction given. There is no evidence that appellant was specifically authorized by appellant to sell at \$43.50 per share, or at any fixed price, and, as before

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stated, this was not claimed by appellant. Therefore there is no basis in the evidence for the instruction.

The judgment will be reversed and the cause will be remanded.

Reversed and remanded.

**Louis D. H. Spikings, Appellee, v. Martin Fox et al.,
Appellants.**

Gen. No. 14,078.

1. LANDLORD AND TENANT—*what not defense to action for rent.* A bad condition of sewerage etc. in demised premises does not constitute an eviction and is not a defense to an action for the recovery of rent where the lease recites that the lessee has "received the demised premises in good repair and condition and will keep them in good repair."

2. LANDLORD AND TENANT—*what not acceptance of surrender.* Merely retaking possession of demised premises after abandonment by the tenant and re-renting the same without notice to or consent by the tenant, is not by itself an acceptance of surrender even though the terms of the demise did not specifically authorize such action by the landlord.

Assumpsit. Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 21, 1908.

Statement by the Court. This is an appeal from a judgment of the Circuit Court in favor of the appellee, Spikings, for \$1,060.29. It was rendered March 20, 1907. The action was in assumpsit for rent of certain premises leased by Spikings to the appellants. The lease was in writing and leased for five years from the first day of May, 1898, at the rental of \$1,500. to be paid in monthly instalments of twenty-five dollars each, the following property: "The store and basement and yard and part of barn

at 2463 Lincoln avenue and the six room flat situated at No. 2461 Lincoln avenue". The following clause follows this description of the property: "The basement to have floor and sink and two gaslight and one offen to be 12 ft. X 14 ft. inside. Store to have one sink; barn to have three stalls and to make driveway into the yard from Carmen ave. or the alley, the offen to be the same as the one at No. 317 W. 12th street".

The defendant pleaded the general issue and also a plea that the words above quoted constituted a condition precedent which the plaintiff had promised to perform, but which he never did perform, "wherefore the consideration of the lease has wholly failed". To this plea the plaintiff replied, traversing it.

The cause was submitted to the court without a jury, and it found for the plaintiff and gave judgment for the sum above mentioned. It was computed as follows: From the full sum of the rent reserved—\$1,500—was deducted \$75 paid by the appellants when they took the lease, and \$534 collected by the plaintiff for occupation before April 30, 1903, from other tenants to whom he rented the premises after their abandonment by the defendants three months after taking possession of them. This sum of \$534 was, the plaintiff says, the amount he received, "trying to rent it to whomever he could".

The balance left due on the lease, according to plaintiff's claim, was \$891, which, with interest to the date of the judgment at 5 per cent., made up the sum designated—\$1,060.29.

PLOTKE & KAUFMAN, for appellants.

EBEN F. RUNYAN, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The defense made in this case was threefold:

First. That the lease contained "conditions pre-

cedent" to the covenant of the lessees to pay rent, which conditions precedent were not performed by the lessor. Waiving any question whether the words which appear in the lease after the description of the property constitute "conditions precedent", the evidence is quite clear that the promises were performed. The only testimony of any definiteness on the subject tended to prove that the work promised was all done, and, moreover, was done under the suggestions and actual supervision of the appellant, Martin Fox. It tended to prove further that an improvement or addition to what was required by the lease was made at his suggestion, partly at the expense of the lessor. There was therefore no merit in this defense.

The second ground of defense was that there had practically been an "eviction" by the act or neglect of the landlord, releasing the defendants from the payment of rent.

This rested on various offers made by the defendants (which were rejected by the court) to show a bad condition of the sewerage connections on the property and a bad condition of the furnace therein. But the lease recites that the defendants covenant that "the party of the second part received the demised premises in good order and condition and will keep them in good repair", and that all plumbing, water pipes and sewerage shall be at the risk of said party of the second part. The offers were properly refused on that account. There was evidence of the bursting of a supply pipe at the sidewalk outside the building, which made some temporary trouble in the basement, but that could constitute no eviction. The second ground of defense therefore also failed.

The third ground is the one most vigorously insisted on. It is thus stated in the argument of appellants:

"Appellants' contentions in this case are that after they vacated and abandoned the premises, appellee took possession of the same and re-rented the prem-

ises for the balance of the term to others, without notice to appellants and without their consent”.

As the lease did not contain an express provision giving the lessor the right of re-entry and re-renting for the benefit of the lessees in case of abandonment of the premises by the latter—the appellants say:

“Appellee, having taken possession and without notice to and consent of the appellants re-rented the premises to others for the remainder of the term, thereby accepted the surrender and released appellants from any further obligations on this lease”.

Again it is said: “The evidence * * * shows a clear intention upon the part of appellee, the landlord, to accept the surrender and to release the tenant as inferred from his acts and conduct in the matter. For more than four years appellee was silent, and at no time during that period did he ever demand any rents of appellants, nor ever notified them or communicated with them in reference to the premises in question”.

To sustain these propositions counsel for appellants cite some text-book authorities and adjudications in other states. They also quote the head note of the report of a decision by the Appellate Court of the Third District—Palmer v. Myers, 79 Ill. App. 409—to the effect that “A surrender of demised premises may be inferred from the fact that the landlord, after the vacation of the premises by the tenant, rented them to another”.

If the meaning of this head note must be taken to be that the acceptance of a “surrender” may be inferred from the fact of re-renting *alone*, it does not properly epitomize the opinion of the court, which treats of a very different condition of things.

The law of Illinois has been explicitly declared to be adverse to the appellants’ contention. The opinion of this court in Humiston, Keeling & Co. v. Wheeler, 70 Ill. App. 349, “Nor is a tenant who has abandoned premises and refused to pay rent relieved

from liability by the action of his landlord in renting the premises to another party, save to the extent of the rent so received by the landlord from another", was justified by the decision of the Supreme Court in the same case, when it reached that tribunal. The Supreme Court said: "In case of an abandonment without fault of the landlord or as the result of his acts, he may re-enter and again rent the premises, and credit the lessee with the proceeds, and his so taking possession does not relieve from the payment of rent". *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514.

We think the rulings on the propositions of law tendered by the appellants to the court below, and that court's findings in the cause, were in accordance with the law as we have stated it to be on each of the points involved, and its judgment is therefore affirmed.

Affirmed.

Frank Staar, Appellee, v. Moy Tong Koon, Appellant.

Gen. No. 14,084.

1. **RECEIVERSHIPS—when appointment improvident.** It is improper to appoint a receiver *pendente lite* for a partnership at the instance of a creditor who has levied an execution upon the interest of an individual partner—no showing of peculiar necessity being made.

2. **RECEIVERSHIPS—what essential to valid appointment.** Before a receiver is appointed it is essential that the complainant should either give bond or upon good cause shown should be exempted from so doing, as provided by the act of May 15, 1903, "concerning the appointment and discharge of receivers." And the finding of such good cause should be incorporated in the order of appointment.

Bill in chancery. Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at

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the March term, 1907. Reversed. Opinion filed December 21, 1908.

BULKLEY, GRAY & MORE, for appellant.

LOUIS GREENBERG, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal from an interlocutory order in a chancery proceeding appointing a receiver for the property and business of the firm of Hip Lung, Ying Kee & Co. The bill was brought by the appellee, Staar, against two Chinese: (1) Moy Tong Hoi and (2) Moy Tong Gee, alias Moy Tong Koon. It was filed May 10, 1907. It was entitled "Bill for Dissolution of Partnership". It set up:

A. That three persons (1) Moy Chene alias Hip Lung, alias Mong Tong Chew, (2) Moy Tong Hoi, and (3) Moy Tong Gee, alias, Moy Tong Koon—were co-partners up to May 7, 1907, in conducting a general merchandise store and a hotel at 323 South Clark street, under the name of Hip Lung, Ying Kee and Company.

B. That April 23, 1907, the said Staar had recovered a judgment against Moy Chene, alias Hip Lung, alias Mong Tong Chew, for \$4,671 in the Municipal Court of Chicago, and had placed an execution on the same in the hands of the bailiff of the Municipal Court.

C. That the said bailiff levied on all the right, title and interest of Moy Chene, alias Hip Lung, alias Mong Tong Chew, in the partnership effects of the firm of Hip Lung, Ying Kee & Company, and sold the same at execution sale to said Staar on May 7, 1907.

D. That the business of the Hip Lung, Ying Kee & Co. is conducted and its books are kept in Chinese, which language Staar cannot read or speak.

Wherefore the bill prays: (a) That (1) Moy Tong Hoi, and (2) Moy Tong Gee, alias Moy Tong Koon,

may be required to answer the bill; (b) that the said copartnership may be declared void; (c) that an account be taken of all dealings and transactions of said copartnership from the time of the commencement thereof; (d) that some proper person may, in the meantime, be appointed by the court as receiver to take charge of the said partnership effects and collect whatever money or property may belong or be due to the said firm; (e) that the complainant may have general relief; and (f) that a writ of summons issue against (1) Moy Tong Hoi and (2) Moy Tong Gee, alias Moy Tong Koon, to answer the bill, and a writ of injunction issue against the same persons restraining them from collecting or receiving any debts owing to the said firm, and from using and applying any of the copartnership funds to their own use until the further order of the court.

There is no service shown on either of the defendants, but on May 11, 1907, Messrs. Bulkley, Gray & More, entered an appearance "of the defendant, Moy Tong Koon, sued as Moy Tong Hoi". This seems to have been a mistake, for Moy Tong Hoi in the bill is given no alias, while Moy Tong Koon is given as the alias of Moy Tong Gee, and we find that on May 15, 1907, Bulkley, Gray & More filed the answer of "Moy Tong Koon sued as *Moy Tong Gee*". No other appearance or pleading for either defendant appears in the record.

The answer (A) denies that (1) Moy Chene, alias Hip Lung, alias Moy Tong Chew and (2) Moy Tong Hoi and (3) Moy Tong Gee, alias Moy Tong Koon, were copartners up to May 7, 1907, in the business mentioned in the bill. (B) Neither admits nor denies the judgment charged in the bill against Moy Chene and the issuance of an execution on the same. (C) Neither admits nor denies the levy of such an execution on the right, title and interest of Moy Chene in the partnership effects of the firm of Hip Lung, Ying Kee and Company, and the sale of the same to

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Staar. (D) Alleges, that said Moy Chene did not on said May 7, 1907, have, nor for a number of years prior thereto have, any interest whatever of any kind or nature in said business, conducted under the name of Hip Lung, Ying Kee & Company, at 323 South Clark street, Chicago, and that the answering defendant, Moy Tong Koon, was not as a partner of Moy Chene, alias Hip Lung, alias Mong Tong Chew, engaged in any business at any place in said city on said 7th day of May, 1907, nor for several years prior thereto.

On motion of the complainant the cause was referred to a master to take evidence and report (1) whether a receiver should be appointed *pendente lite* and (2) on the merits of the whole case. The master took a considerable amount of evidence and reported it to the court with his conclusions on June 29, 1907.

His material conclusions were:

First. That the levy and sale alleged in the bill took place and were valid to vest the partnership interest of Hip Lung in the complainant Staar, if there was such a firm as charged in the bill and Hip Lung was a partner in it at the time of the levy, and the execution was on a valid judgment.

Second. That there was enough evidence in the record to show that Hip Lung was a partner in the firm of Hip Lung, Ying Kee & Co., doing business at 323 South Clark street, and was such partner on May 7, 1907.

Third. That there was no definite showing as to who the present partners were, or of the proportionate interest owned by Hip Lung in the firm.

Fourth. That because no valid evidence of a judgment was shown, the bill should be dismissed.

Nothing was said in the report concerning a receiver. The recommendation was merely that the bill be dismissed. Exceptions were filed to the master's report by the solicitors for the defendant, Moy Tong Koon, but they were not acted on. The following

order, however, was on August 26, 1907, entered by a chancellor of the Circuit Court:

“This cause coming on to be heard upon the report of the master to whom this cause was heretofore referred to take testimony and report upon law and fact as to the motion of said complainant for a receiver of the goods, chattels, credits and effects of said *copartnership* of Hip Lung, Ying Kee and Company, and the court having inspected said report and heard arguments of counsel for the respective parties, and being fully advised in the premises, doth find that it is fit and proper that a receiver should be forthwith appointed in the premises. It is therefore ordered by the court that the American Trust and Savings Bank be and is hereby appointed receiver of all and singular the rights, credits, property and assets of said *corporation* upon *his* giving a bond herein with surety and conditions to be approved by the court in the penal sum of \$10,000, and that *he* be thereupon invested with all the powers, rights, and duties of receivers in such behalf, and that said defendants *and each of them* deliver to said receiver all property of said *copartnership* in their joint and several possessions *and that the* exceptions to the report of said master to said report be reserved for future action by the court”.

It is from this order that the present appeal was taken. The record shows that on the day following its entry another order was entered appointing Bernhard Loeff receiver in the place of the American Trust & Savings Bank “upon the same conditions and terms as per order entered the 20th day of August, 1907, and to give bond in the sum of \$10,000 with a Surety Company bond.” The appeal bond signed by Moy Tong Koon as principal and by a surety recites the order appealed from as one “appointing a receiver for the property of the above bounden Moy Tong Koon”.

The bond of the receiver, Bernhard Loeff, is shown in the record, and recites that he has been appointed “receiver of all the property, equitable interests,

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things in action and effects of the defendant *Moy Tong Hoi et al.*"

It is unnecessary to discuss most of the matters found in the transcript of the record, the abstract and briefs in this case. That it is an appeal from an interlocutory order appointing a receiver *pendente lite* seems almost lost sight of in the arguments. The receiver was improvidently appointed and the order must be reversed.

There is no sufficient reason even suggested for the appointment of a receiver anywhere in the record. Assuming that Hip Lung, alias Mong Tong Chew, was a partner in an unknown proportion in the firm of Hip Lung, Ying Kee & Company, and that his interest passed under an execution sale to Staar—assuming even that the appellee's position is correct that as the master found there was no sufficient evidence to show the amount of Hip Lung's interest, it must be presumed to be one-third—all of them propositions open to question at least—there is nothing in all that of itself to entitle the complainant Staar to a receiver of the copartnership assets *pendente lite*. There was no showing of such a necessity in the allegations of the bill nor did the master find from the testimony and report any such necessity. The right of Staar in such a case, on a final decree even, was for an accounting and the collection and distribution of the assets perhaps, but not necessarily a receiver even then. The suggestion that because the business is a Chinese one, and the books and papers of it are kept in the Chinese language, a receiver who, presumably, does not know Chinese should be appointed to seize the Chinese goods, books and papers pending the suit, because the complainant also is ignorant of Chinese, seems to us at least a *non-sequitur*. A surer way to ruin the business hardly seems conceivable. The only argument put forward to show the necessity of a receiver is, that in dealing with Chinese the complainant will never be sure of receiving his money from his

individual debtor, Hip Lung, unless the entire assets and all the effects and the business of a copartnership, in which persons other than Hip Lung are also interested in an unknown proportion, are ruthlessly taken pending the accounting from their hands and put into those of a stranger, necessarily ignorant of the business, under the direction of a court presumably and necessarily equally so. That is not a sufficient reason. The rights of the other partners of Hip Lung, Ying Kee & Co. are as valuable in the eyes of the law and as much to be respected and preserved as those of the complainant.

That the order appointing a receiver was drafted in haste seems evident from its wording, as shown by the words we have italicized. The actual words of appointment call Hip Lung, Ying Kee & Co. a "corporation", for example.

Nor did the court proceed according to our construction at least of the Act of May 15, 1903, "concerning the appointment and discharge of receivers".

That Act, recognizing the danger of damages from summary and often times improvident proceedings in the appointment of receivers, provides: "That before any receiver shall be appointed, the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court or judge conditioned to pay all damages, including reasonable attorney's fees, sustained by reason of the appointment and acts of such receiver, in case the appointment of such receiver is revoked or set aside; Provided, that bond need not be required when *for good cause shown* and upon notice and full hearing the court is of the opinion that a receiver ought to be appointed without such bond".

In construing this statute in *Watson v. Cudney*, 144 Ill. App. 624, we said: "To entitle appellee to the appointment of a receiver, he must, as a *sine qua non* to the enforcement of that right, give the bond

required by the statute, unless it is the opinion of the court that a receiver ought to be appointed without bond, *and then the court's opinion must affirmatively appear in the order making the appointment.* The statutory requirement in this regard cannot be dispensed with. It was evidently enacted for the purpose of making liable the moving party in a receivership proceeding for such damages as might result from the improvidence of his act in bringing about a receivership where none should have been asked”.

There was no bond of the complainant required and none given in this case, although we think it most markedly a case where such a bond should have been furnished if a receiver was to be appointed. If the chancellor thought otherwise, he should have incorporated his finding to that effect in his order.

The emphasis of appellee's argument seems to be placed on the theory that Moy Tong Koon, who prayed the appeal from this order, had no right to do so because, as appellee claims, he was neither a party to the suit nor shown by the records to be prejudiced by the judgment. Persons not falling within one or the other of these classes, he cites authority to show, are not entitled to an appeal.

It is unnecessary to consider whether the testimony of Moy Tong Koon, given before the master through an interpreter, overcomes the implications of his answer in the cause, that the bill was not incorrect in charging him with being a partner in the business conducted under the name of Hip Lung, Ying Kee & Co., because, whether or not a partner and damaged by the order, he was “a party to the suit”.

Appellee says in his brief that Moy Tong Koon “budded in”, that the bill describes the defendants as brothers, and while “it is true that one of the brothers was named Moy Tong Gee alias Moy Tong Koon, that does not furnish an excuse for an outsider, who bears that name, to make himself a party, when he has no interest in the litigation”.

Certainly not, but the position that Moy Tong Koon, the appellant here, is "an outsider who bears that name", is entirely unsustained and unsustainable. The only jurisdiction shown in this case of any body as a defendant is derived from the answer filed in it *for the appellant*, "Moy Tong Koon sued as Moy Tong Gee". It is true that a prior appearance by the same solicitors had been entered, which spoke of Moy Tong Koon "sued as *Moy Tong Hoi*"—an evident mistake, considering the pleadings together—but no ground for any pretense exists in the case that the appearance and answer were not for the same persons, and that person the second of the defendants named in the bill.

We think that before a receiver should have been appointed in any possible event, Hip Lung and Moy Tong Hoi should have been brought into court. The first was not made a party and no attempt to serve the second seems to have been made. If the Moy Tong Koon who answered and who appeals was not the Moy Tong Koon who was made a defendant, as counsel for appellee now contends, then the complainant has brought no defendant to his bill into court, nor attempted to do so, and yet has procured a receiver *pendente lite* to take possession of a large business.

The order of the Circuit Court appointing the receiver in this cause is reversed.

Reversed.

Andrew Burek, Appellee, v. Western Electric Company, Appellant.

Gen. No. 14,092.

1. **ASSIGNMENTS OF ERROR**—*what waiver of action of court in denying new trial*. Where the brief of counsel for appellant calls upon the Appellate Court either to reverse without remandment or to affirm, the Appellate Court will so affirm, notwithstanding it

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may be of opinion that the verdict is contrary to the weight of the evidence but not so as to justify reversal without remandment, the request being treated as a waiver of the assignment of error on the refusal of the lower court to grant a new trial.

2. **APPEALS AND ERRORS**—*power to reverse without remandment.* The Appellate Court when called upon may weigh the evidence and if there be a clear preponderance against the verdict and judgment, may reverse without remanding.

3. **APPEALS AND ERRORS**—*when power to reverse without remanding exercised.* It is only in extreme cases in the exercise of great care, that the Appellate Court will exercise its power to reverse without remanding.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1907. **Affirmed.** Opinion filed December 21, 1908.

HOLT, WHEELER & SIDLEY, for appellant.

L. A. KAPSA and CHARLES C. SPENCER, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The plaintiff in this cause unfortunately lost the first joints of the two middle fingers of his left hand while working for the defendant running a drill press. He sued the defendant in the Circuit Court, alleging himself to be a youth of nineteen years (the evidence showed him to be even younger) at the time of the accident, and in one count of the declaration that the defendant, after setting him to work on the drill press, with which he was unacquainted, gave him improper and neglected to give him proper instructions in regard thereto, and in the second count that the defendant negligently permitted said drills and pulleys connected therewith "to be out of repair and carelessly furnished the plaintiff with a certain wire with which to clean a certain countersink drill which the plaintiff was then and there using, which wire was unsafe and improper for such use".

On the trial the jury returned a verdict for \$700

in favor of the plaintiff. The defendant moved for a new trial and in arrest of judgment, but its motions were overruled and judgment was entered on the verdict. From that judgment this appeal has been taken by the defendant. In giving the case to the jury the court instructed them that the plaintiff was not entitled to recover on the first count of his declaration.

In this court it has been assigned by the appellant for error that the court erred in rulings on evidence and in giving and refusing instructions, in overruling the defendant's motion for a new trial and in arrest of judgment; that the evidence was variant from the declaration, and that the declaration did not support the judgment; that the verdict was contrary to the weight of the evidence, to all the evidence, and to the instructions, and, finally, that the court erred in refusing at the close of the plaintiff's evidence, and again at the close of all the evidence, a peremptory instruction for the defendant.

At the conclusion of their argument in chief the counsel for appellant, however, say: "We submit that the evidence wholly failing to sustain a single one of the charges of negligence brought against defendant, but on the contrary showing conclusively that the proximate cause of plaintiff's injury was his own rash and voluntary act in looping the wire around his fingers, the trial court should have instructed the jury at the close of all the evidence as requested by the defendant, to find the defendant not guilty, and that this court should correct a manifest miscarriage of justice by reversing the judgment herein without remandment. *Unless such order is entered we prefer to submit to one of affirmance.*"

Of this the appellee argues that it is a practical waiver of all the assigned errors except that of refusing the peremptory instruction, and that all that therefore we have to consider is whether the plaintiff's evidence, taken by itself, is sufficient to sustain a recovery.

This construction of their language appellant's coun-

sel repudiate, pointing out that the Supreme Court in many cases has held and that it is the firmly established law of the state, that an appellate court, when it determines that the facts were not correctly found by the lower court, may reverse a judgment of that court in favor of the plaintiff without remanding the case for another trial. In other words, the Appellate Court, even in cases tried by a jury, must weigh the evidence if requested to do so; and if there be a clear and manifest preponderance against the verdict and judgment, *may* reverse without remanding.

This is undoubtedly a correct statement of the law as laid down in *Borg v. R. R. Co.*, 162 Ill. 348, and cases before and since, and the power and duty thus confided to the Appellate Court has been often exercised. The Supreme Court has held too that such reversal without remandment is a bar to a subsequent suit in the court of original jurisdiction on the same cause of action—a point for a long time in dispute. *Larkins v. Terminal R. R. Assn.*, 221 Ill. 428.

Nevertheless, we must hold the language of the defendant's argument in this cause, and the request implied in it, a waiver of that assignment of error which attacked the denial of the Circuit Court of a motion for a new trial. Otherwise we could give it no effect at all—a consummation obviously not to be wished. Questions on instructions, variance, and rulings on evidence, are thus brushed out of the way. Under the peculiar powers given us by the state of the law, however, in that regard, an assignment of error in this court that the verdict is against the weight of the evidence, is logically something more than a corollary or subsidiary proposition to the assignment of error that a new trial was improperly refused below. To decide that a new trial should have been given leads naturally to the exercise of our power to give it. To reverse without remanding—as we may and must in the exercise of our duty sometimes do—is not to give a new trial, but to cancel the results of the old one and for-

ever bar the plaintiff from pursuing his supposed cause of action. This power is properly invoked when the record warrants it under the assignment of error that the verdict is contrary to the weight of the evidence. Therefore, as we have said, we are obliged to give to this assignment of error in the present case a wider effect than that of questioning the ruling of the court on the motion for a new trial.

But although the power and duty of the Appellate Court under the law thus to deny to a litigant both the result and the right of a jury trial of his cause (which is the effect of a reversal without remandment of a judgment based on the verdict of a jury) is unquestionable, the responsibility assumed in doing it is always carefully weighed by us.

When by the submission of a cause to the court without a jury, a jury has been waived in the court of primary jurisdiction, the statute is plain and the usage of the court accords therewith. We regard the waiver as made for this court as well as for the trial court, and give final judgment as we deem the law and facts require.

But when no waiver of a jury has been made, either express or implied, we are reluctant unless moved by strong considerations, finally to deprive a litigant of the opportunity to secure the judgment of a jury. Thus, although as pointed out by counsel for appellant in this case, we have been given the power to pass even on the credibility of witnesses, it is very unusual for us, when the evidence is conflicting and its weight depends on the relative credibility of witnesses who have appeared before a jury, to imply by reversal without remandment that we can judge better, by reading the printed report of the words of witnesses, of their veracity, than can the jurymen who have seen them and heard them testify.

In the case at bar we have studied the testimony as it appears in the record carefully. It would be useless—a mere waste of time—to discuss it, considering

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the conclusions to which we have arrived, which are that the preponderance of the evidence is with the defendant, and that had we not been expressly requested not to do it, by what must be considered a waiver of the errors assigned so far as they would require that result, we should reverse the judgment and remand the case for another trial; but that it is not a case in which the judgment should be reversed without remandment.

While to us it seems improbable that this accident happened as the plaintiff says it did—without his having previously looped the wire around his fingers—yet we are unwilling to say as a matter of law that it was impossible. We are unwilling, as a matter of law, to say that a defective condition of the machine had nothing to do with the catching of the plaintiff's fingers, although we think it improbable that it did. We are unwilling to say, as a matter of law, that the wire furnished the plaintiff, considering its size, his age and experience and the exceedingly rapid motions of the machine, was a safe and proper instrument, although we are inclined to think it was. In fine, we are unwilling in this case to take forever from the plaintiff the opportunity to present his contentions on his alleged contributory negligence and assumption of risk, to a jury.

Therefore the judgment of the Circuit Court is affirmed.

Affirmed.

H. W. Kessler et al., Appellees, v. Mills Novelty Company, Appellant.

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VERDICT—*when not disturbed.* A verdict not clearly against the preponderance of the evidence and which appears to have been rendered without the intervention of substantial error, will not be reversed upon review.

Assumpsit. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1907. **Affirmed.** Opinion filed December 21, 1908.

Statement by the Court. This is an appeal from a judgment in assumpsit in favor of the appellees, plaintiffs below, against the appellant, defendant below, for \$3,899.25. The judgment was based on the verdict of a jury, to which the claim of the plaintiff had been submitted under full instructions of the court after a motion had been denied for a peremptory instruction for the defendant. After the verdict a motion for a new trial and a motion in arrest of judgment made by the defendant were denied. This appeal followed a judgment on the verdict. In this court the assignments of error made and argued are, that the verdict is against the weight of the evidence; that the trial judge erred in refusing certain instructions requested by the defendant, and in modifying others so requested; that he also erred in his rulings on the admission of evidence, and in making in the presence of the jury certain remarks and asking certain questions of a witness.

ADLER & LEDERER, for appellant.

WHITMAN & HORNER, for appellees.

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MR. JUSTICE BROWN delivered the opinion of the court.

This suit was brought by Kessler and Salomon, the appellees, who do business under the name of Royal Metal Manufacturing Company, against the Mills Novelty Company, a corporation, the appellant, for a breach of this contract:

“CHICAGO, ILLINOIS, April, 24, 1901.

We hereby agree to furnish and deliver to their factory, Mills Novelty Company, 23 So. Jefferson St., Chicago, Ills., Five Thousand (5,000) Iron Stands, 40 ins. high, made from $3/16 \times 5/8$ and $1/8 \times 5/8$ iron, style and shape as per sample submitted, at \$1.50 each (No. 1).

Five Thousand (5,000) Iron Stands, 36 ins. high, made from $3/16 \times 5/8$ and $1/8 \times 5/8$ iron, style and shape as per sample submitted, the size of the stand to be made to fit base casting for our Orbit Jr. Peanut Machine, furnish by the Mills Novelty Co. at \$1.25 each (No. 2).

We agree to deliver to said Company, Mills Novelty Co., one thousand (1,000) stands per week. (The above prices are net.)

ROYAL METAL MFG. Co.,
Jos. Salomon.

We accept above price, and agree to receive all stands which are satisfactory in the above contract.

MILLS NOVELTY Co.,
per Kellogg.”

The breach complained of in the declaration of the plaintiff was that defendant, after accepting and paying for 3794 of the stands, made according to the shape and style of sample No. 1, and 1007 of said stands made according to the shape and style of sample No. 2, and although the plaintiffs were at all times ready and willing to make, furnish and deliver to defendant the balance of said stands, to-wit: 1206 of No. 1 and 3993 of No. 2, according to said contract, and had offered to perform said contract, by its acts prevented and delayed the manufacture and delivery of the bal-

ance of said stands, according to the terms of said contract, and notified plaintiffs that it would not accept or receive any of the balance of said stands.

The defendant corporation pleaded (1) the general issue; (2) that the iron stands in plaintiff's declaration as mentioned as delivered to this defendant were not made according to the shape and style of said samples 1 and 2, and were not suited for the uses for which the plaintiffs knew the defendant intended them, nor for any use whatever, and were not satisfactory to the defendant; and that the said stands so delivered to the defendant and paid for by it, were delivered to the defendant boxed up and ready for shipment, and the defendant assumed that said stands so delivered were of the make and style of the samples, etc., and shipped them out to customers; that many of them have been returned as totally unfitted for use, and have become a total loss to the defendant, as the customers refused to pay for the same and the defendant has been unable to sell or use them; and (3) a plea of set-off based substantially on the same matters and averments as are made in the second plea, particularly averring, however, that the stands received by the defendant were not made to fit the base castings for Orbit Jr. Peanut machine; by reason of all which, the defendant alleges itself to have been damaged to the extent of \$10,000, which it offers to set off against the claim of the plaintiffs.

The plaintiffs replied, joining issue, and the jury found the issues for the plaintiff and rendered a verdict for the full amount claimed, which was the difference, as appeared by the evidence, between the cost to the plaintiffs of 5199 stands and the contract price which defendant agreed to pay for them.

As it is urged that the verdict is against the weight of the evidence and should be set aside for that reason, we think it well to set out the documentary evidence which is not in dispute in connection with the dates of the transactions involved.

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The contract was made April 24, 1901. Before that time the Royal Metal Manufacturing Company had made 1000 stands for the Mills Novelty Co., of like style as those mentioned in the contract for \$10,000. They had been accepted and paid for. Immediately after the execution of the contract the plaintiffs began to manufacture the stands provided for therein. Plaintiffs from time to time delivered 3794 of stands No. 1 and 1007 of stands No. 2 to defendant, and received payment therefor, according to the terms of the contract; the stands, in an unassembled or "knock-down" condition being received by the stock-keeper of the Mills Novelty Company and receipted for. These deliveries occurred in May, June, July, August and September, 1901. In October, 1901, the plaintiffs received the two following letters from the Mills Novelty Company:

"Oct. 9, 1901.

ROYAL METAL MFG. Co., City:

GENTLEMEN: Please do not deliver more Peanut Machine stands to us until further advised, as we have all we can take care of at the present time. Mr. Kellogg, our purchasing agent, is sick today, and we will ask him to take the matter of further deliveries up with you upon his return to the office.

Very truly yours,

Mills Novelty Co.,

F. M. TRACEY,

Gen. Mgr."

"Oct. 17th, 1901.

ROYAL METAL WORKS,

32 W. Washington St., Chicago, Ill.

GENTLEMEN:—Owing to an overstock in metal stands which you have made for us on contract, we are desirous of canceling balance of same. We would like very much to have your Mr. Salomon call at his earliest convenience to settle this matter up.

Trusting that you will thoroughly understand our

position in this matter; and that satisfactory arrangements will be made, we remain,

Very truly yours
MILLS NOVELTY CO.,
N. P. Kellogg."

Evidently after further correspondence on the matter, in August, 1903, about two months before this suit was brought, the plaintiffs received the following letter:

"Aug. 14, 1903.

ROYAL METAL MFG. Co.,
34 W. Washington St., City:

GENTLEMEN: Your favor of the 14th at hand and contents noted. In reply will say we do not understand what you mean when you say we have never disputed your claim that we gave you an order for ten thousand stands. The writer personally knows that the order was never for more than five thousand, and has always doubted that it was for even that many, as it would take us five years or more to get rid of them. If you can show us an order on our stationery, upon which all orders are made, signed by the purchasing agent and acknowledged by the manager, (all orders for that amount of goods must be signed by the manager as per our letter to you of June 22, 1901), you will have no trouble in getting whatever is coming to you. We think it will not be necessary for us to say anything further in regard to this matter.

Very truly yours,
MILLS NOVELTY CO.,
H. S. Mills, Prest."

We do not know that the plaintiffs did or could show the defendant an order on the Mills Co.'s "stationery", nor one "acknowledged by the manager"—whatever that may mean—but they certainly were able to show a contract to receive and pay for 10,000 stands, signed by the purchasing agent, and the binding force and validity of which is not denied by the defendant.

It would seem therefore that in October, 1901, and

August, 1903, the Mills Novelty Company, took different ground, in their attempt to avoid payment and escape liability, from that which they occupied in the pleadings and in the trial of this cause.

It is not strange, therefore, that the trial judge asked, apparently in some surprise, when a witness upon the stand testified as to dissatisfaction with the stands which were received and paid for, whether there could be found anything in these letters hinting at any such ground of escape from the contract. These questions are vigorously objected to by the appellant as "prejudicial remarks of the judge" which ought to reverse the judgment. We do not think so. Perhaps it would have been as well not to make them, but it is rather hard to expect a judge to exhibit no surprise when things really surprising transpire in the evidence.

With this background, as it were, of letters from the principal officers of the company which, to the ordinary mind, cannot but seem strikingly inconsistent with the theory that the defendant had found the stands received and paid for by them imperfect, and for that reason had declined to take the remainder, it is not strange that the conflicting testimony of the witnesses was not viewed by the jury as counsel for appellant view it. It is needless for us to discuss it.

The testimony for the plaintiff was amply sufficient to support the verdict, and the jury heard and saw those witnesses who contradicted each other. The jury also saw sample stands, which are not before us. There were ten selected at random and set up in the presence of the jury. They were explained by the witness by indications which we have no means of following. We have therefore no justification whatever for disturbing the results arrived at by the jury. Indeed we can say, after a reading of the evidence as it appears in print, that we should have been astonished had the verdict been different. As we so hold, the rule of practice relied on by the defendant's coun-

sel, that in a close case, even slight errors of the trial court should reverse, loses in this case its supposed force.

We do not think this case a close one, nor do we think that the rulings on evidence or on instructions by the learned trial judge affected the result. We find in them no reversible error. Some of the rulings on evidence may have been in themselves doubtful, but not every error of this sort will reverse.

We do not think the instructions as asked or as modified were applicable to this case. The stands which were delivered were received, paid for and appropriated to the use of the defendant. We do not think the evidence about them in the record is any more applicable to the refusal of the defendant to go on and complete its contract, than it would have been to a refusal to pay the purchase price. *America Theatre Co. v. Siegel, Cooper & Co.*, 221 Ill. 145.

The modified instructions as correctly stated the law as applicable to this case as the ones tendered did. But we doubt if they had any proper application to the issues of this case.

We are convinced, on the whole record, that there was no substantial meritorious defense to this suit, and that the verdict of the jury was correct, and the judgment based on it without error. It is accordingly affirmed.

Affirmed.

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**Ruth J. McDavitt, Appellee, v. South Side Elevated
Railroad Company, Appellant.**

Gen. No. 14,103.

TRIAL—*what arguments of counsel improper.* In an action for personal injuries remarks of counsel in argument referring to medical experts as follows, are inflammatory and improper: "Do you think there is enough evidence bought up at \$50 a day, the same as this has been, to divert you attention from the facts of this case and to defeat this claim?" and, referring to a particular doctor, "He gave me the impression of a Judas, who would not come here until he got the \$50." A verdict induced by such language will not be given the same consideration as is accorded to one obtained by appropriate arguments.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed December 21, 1908.

Statement by the Court. This is an appeal from a judgment of the Superior Court of Cook county for \$5,000 against the South Side Elevated Railroad Company, the appellant, in favor of Ruth J. McDavitt, the plaintiff below and appellee here.

The judgment was in an action on the case for personal injuries received, as it is alleged, by the plaintiff, Ruth McDavitt, while a passenger in the cars of the defendant, appellant. The gist of the complaint made by the plaintiff against the defendant is that the guard in charge of a coach in a train of the defendant, in which the plaintiff was a passenger, called out the name of the station at which plaintiff wished to stop, just as the train came to a full stop; that thereupon she, the plaintiff, arose from one of the cross-seats of the coach, and made her way to the door; that while she was between the cross-seats and the door and opposite the longitudinal seats with which the ends of the car are fitted, and before she had an opportunity to alight, "the defendant then

and there carelessly and negligently, without giving said plaintiff any warning of its intention to start said train or coach forward, and while plaintiff was in the act and position aforesaid, and unmindful of defendant's intention, started forward the said train and coach in and upon which plaintiff was then riding as a passenger as aforesaid, whereupon and by reason thereof, plaintiff lost her equilibrium and then and there staggered and fell backward with great force and violence to and upon the arm of one of the seats in said coach" (a division between single seats on the longitudinal benches), "by reason of all which said premises, plaintiff received a severe, dangerous and permanent injury to the vertebræ of the spine in the region of the coccyx, her nervous system was greatly shocked and permanently impaired and plaintiff was otherwise severely, dangerously and permanently injured both internally and externally".

The case was duly submitted to a jury and a verdict in favor of the plaintiff for \$5,000 was rendered. A motion for a new trial based on the claim that the court erred in rulings on evidence and in rulings on instructions, that the arguments to the jury of counsel for the plaintiff were appeals to passion and prejudice, and that the verdict was against the weight of the evidence and was excessive, was overruled. A motion in arrest of judgment was also overruled, and judgment and this appeal followed.

In this court the assignments of error cover the points made in the motion for a new trial.

FRANCIS W. WALKER and WILLIAM H. HAIGHT, for appellant; NOBLE B. JUDAH, of counsel.

FRED H. ATWOOD, FRANK B. PEASE, CHARLES O. LOUCKS and HARRY A. BLOSSAT, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The position of appellant in this case is princi-

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pally based on the claim that the verdict is against the weight of the evidence.

It is said, first, that the fall from which the plaintiff suffered the injuries complained of, obviously could not have taken place as she says. We do not recognize this impossibility from the evidence, nor deem that the inferences which counsel for defendant draw from the testimony of the plaintiff, who alone described the accident, are necessarily correct. Her testimony is not altogether precise, but from a careful reading of it, we think the statement of the accident which she meant by her words to make, was possible and not unnatural or remarkable in its nature. Nor does an equally careful perusal of the testimony of Seely, Gillow and Hopkins convince us that the movement of the train which she described and which she specifies as the negligence which renders the defendant liable, was an impossible one.

The testimony of Dr. Knudson does impeach the plaintiff's testimony by tending to show a different statement by her to him of the facts of the accident a fortnight after it occurred—a statement which in its effect would relieve the railroad company from liability. But it was for the jury to say whether this impeachment should be successful. Whether, after it, they should give or refuse credence to the plaintiff's testimony, it seems to us for them to decide.

But in another sense and on another phase of the case, we do think the verdict against the weight of the evidence. It is in our opinion, excessive, when the evidence is weighed. We forbear, therefore, inasmuch as the case may come before another jury for another trial, to discuss more particularly or in detail the evidence on the accident itself.

But the evidence on the character of the injury received by the plaintiff and its ultimate results, demands analysis in its bearing on the question of damages. The plaintiff claims that by the accident she so injured herself that immediately she began to suf-

fer great physical agony; that after she reached home on the day in question, she immediately was obliged to go to bed and there staid in great pain for a fortnight; that she then applied to Dr. Knudson (whom she had been told was the surgeon for the defendant company), who examined her and made a report to the company, but who did not so far as she remembers, advise any treatment beyond commending and perhaps emphasizing the necessity of the hot applications which Dr. Melendy, a woman physician with whom the plaintiff was living, had already been using. Immediately thereafter, she claims, she had acute peritonitis, as the result of the accident, which again confined her to her bed for a considerable time, gave her great pain and ended in some internal abscess, which six months or so afterward broke and passed its contents off through the bowels. But this even, was not the extent of the ill health resulting from the injury, as she claims.

She claimed that at the time of the accident, October 15, 1903, she was in good health and able to conduct difficult and arduous duties in her calling of a trained nurse; that since that time she had not only suffered pain continuously up to the time of the trial in June, 1907, in the region of the sacrum and coccyx, where her injury was received, but also a highly nervous condition, culminating in and constituting neurasthenia, was the result of the injury. From this neurasthenia it has resulted that she has been unable to do any work of consequence or follow her avocation, although she was able before the accident to earn \$25 per week and expenses.

It must be conceded that if the weight of the evidence in this record is not clearly against this claim that she makes that these are the results of the accident, the damages are not excessive or out of proportion to them. But we cannot agree with the contention that it is not.

Even if the status of her health before and after

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the accident be assumed to have been exactly as she described it, the expert medical testimony cannot be ignored as to whether the condition of her health from October, 1903, to June, 1907, was the result of her injuries.

To the change in the condition of her health from that time she herself testifies, and there was introduced in addition the testimony of the female physician, a Dr. Melendy, with whom she resided at the time of the accident, and several lay-witnesses who had known her before and after the accident and noticed increased nervousness and restlessness and more or less emaciation after the accident, although they had considered her well and strong before.

But assuming, as we have indicated, this evidence sufficient to justify the belief, implied, as we think, in the verdict of the jury, that prior to the injury and also prior to the attack of peritonitis in the fall and early winter of 1903, to which she swears, she was in good health, there still remains the question to be considered on the evidence—was the peritonitis itself and was the neuresthenia and the condition of the plaintiff's health between the winter of 1903 and the time of the trial, the result of the injury she received?

The evidence of the change and the dates of it is competent and relevant in the consideration of the question, but it is not conclusive. It must be considered with reference to the testimony of scientific and reputable medical men who were called as witnesses for plaintiff and defendant. We do not agree with the implications of the argument of counsel for the plaintiff—preserved in the record—that the “theories” of reputable physicians are “a lot of stuff”, such as dreams are made of. Scientific facts are facts like other facts, and “theories”, in the sense in which counsel used the word, may be—although of course they are not always—the proven and demonstrable truths of science. And it is not inappropriate here to say that our disinclination to let this judgment stand

on the record of the jury trial which has taken place, is very much emphasized and heightened by the language concerning the medical testimony for the plaintiff which is complained of by the defendant. It is unnecessary for us to hold that on that alone we should have reversed this judgment, to give to it a certain weight in the disposition of the case.

When the essential question is on the weight of the medical evidence as to the possibility of certain physical results from certain physical causes, appeal to the prejudice and passion of the jury against reputable physicians who are obtaining the fees commonly given to medical experts, by such expressions concerning them in general as, "Do you think there is enough evidence bought up at \$50 a day, the same as this has been, to divert your attention from the facts of this case and to defeat this claim?" and concerning one doctor in particular, against whom no just cause of suspicion or animadversion appears, "He gave me the impression of a Judas, who would not come here until he got the \$50", may well lessen the hesitation we must feel in disturbing the verdict of a jury because our view seems to differ from theirs as to the weight of the evidence. In determining, that is, the question whether the verdict was clearly against the weight of the evidence, we are justified in giving less consideration to the opinion of a jury appealed to in this way than to one where such inflammatory language has not been used.

In considering and analyzing the medical testimony, we may treat as negligible, for reasons that are obvious and unnecessary to detail, that of Dr. Melendy. Plaintiff's counsel, who offered it, disclaims offering it as that of an expert. They say: "She was merely a sort of a nurse that had studied medicine and with whom the plaintiff was living. The plaintiff had another doctor, Dr. Maxon, who was in Mexico at the time of the trial."

Seven medical witnesses besides Dr. Melendy were

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examined. Of these Drs. Babcock and Harsha, both called for the plaintiff, had known her and seen her before the accident in October, 1903, and had also examined her after that time and before the trial. Dr. Knudson, called for the defendant, had seen and examined her two weeks after the accident and twice thereafter. Dr. Stowell, called for the defendant, had examined her about a year before the trial and two years or more after the accident, and testified to her then condition. In addition to their specific knowledge in this case, however, they were all examined as experts and their opinion evidence on medical questions asked and secured.

Dr. Hall, Dr. Price and Dr. Leaming were also called by the defendant and testified, but purely as experts, they having made no examinations of the plaintiff and testifying to medical and physiological propositions and in answer to hypothetical questions.

All these seven witnesses were, so far as this record discloses, reputable, well educated and well informed men in their profession, the record or character of none of them deserving the animadversions cast on some of them in the course of the trial and argument.

To give point to the salient features of their testimony it is necessary, first, to state the history of the plaintiff's physical condition and surroundings before and after the accident as detailed by herself. She was graduated as a nurse from St. Luke's Hospital in 1889, being then 21 years old. In March, 1895, she was married, and in the summer of 1896 had a child born, which however died shortly after its birth. Her husband, however, separated from her in September, 1896. The delivery of her child was a difficult labor. It was delivered by instruments while she was under the influence of anaesthetics, and there was internal laceration of the cervix of the womb. After her confinement she remained in bed a month. She was examined by Dr. Harsha three or four months afterward,

and his testimony on her condition will be hereinafter noted. He made also a subsequent examination three or four months later. During the year 1898 she went also to two other physicians for relief. During that time, she says, she had pain in the abdomen, described by her as at first intense and sharp pain and afterward a heavy, painful feeling.

Previous to this she had no illness, she says, except diphtheria in the winter of 1890 and 1891, and an attack of gout in 1890 and 1893.

Asked about her health the time of her confinement in 1896, she answered that she did not do any irksome work from 1896 to 1898, but that in February, 1898, she went to work nursing, and that though she rested during that summer and again after the fall of 1898, until sometime in 1899, from that time on in 1899 to the time of the accident, she worked very hard at her calling. Her counsel asked her: "From 1899 or 1900 down to the time you were injured, what was your general condition of health; were you strong or weakly?" Her answer was: "I wasn't weakly; I worked very hard, and I couldn't do it if I was weak". "Q. Were you strong?" "A. I was strong enough to do hard work."

She said that immediately before the accident she was able to work very hard and was working very hard, nursing a malignant cancer case.

At the immediate time of the accident she suffered, she testified, great agony at the end of the spine, and this pain, in a severe form, lasted until the time of the trial.

On alighting from the car after the accident, she walked, assisted by a fellow passenger, down the stairs of the elevated station and then, unaided, to Marshall Field's store, a block and a half away, and from there took a surface car to the residence of friends two miles away, and then home to Dr. Melendy's where she roomed. There she was put to bed. In a fortnight she went to see Dr. Knudson, and shortly afterward,

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as noted, the exact date being left perhaps somewhat doubtful, although Dr. Melendy, who treated her during this time, says she thinks it was about six or seven weeks after the accident, which agrees with what Dr. Knudson testifies Dr. Melendy told him on the third examination he made of the plaintiff in Dr. Melendy's presence on January 21, 1904, she developed peritonitis.

The plaintiff says the acute peritonitis lasted two or three weeks, during which she was confined to her bed. Before she had peritonitis she says she was able to get around, but only with much suffering. After that until some time in February, 1904, she was "up and down and would get up and get very sick on account of getting up".

In February she went to Alabama to take a case, but was unable to work. The internal abscess in her side broke and the contents passed out through her bowels, she says, in the spring or summer of 1904; but although she returned from Alabama and essayed again in Chicago to follow her avocation, she had been unable to work with success and had been an invalid and practically unable to work.

At the time of the trial, the pain was not great when she rested or was lying down, but severe when she exerted herself. She refused on the trial to have physical examinations made by physicians named by the defendant, or by the court, on the ground that it would be useless and painful.

In treating her after the accident Dr. Melendy found some swelling and discoloration over the sacrum and coccyx, appearing a few hours after the accident, but they disappeared after two days.

Dr. Harsha testified that he first examined the plaintiff three or four months after her child was born in 1896; that her condition was then fair; that there was some but not aggravated laceration of the womb; that he examined her again three or four months later and found much less laceration; that after that he saw her

perhaps three times a year, and that while her general condition of health was fairly good, she was nervous, but less, probably, than she was immediately after her delivery. Two years and a half after the accident, that is, in June, 1906, he examined her again, and says that except that the signs of nervousness were greater, amounting to neuresthenia, and that there was a falling off of weight, he found her physically as healthy as usual. He could not feel anything different from the time he examined her before. Neuresthenia, he testified, might be caused by many things, and among them he mentioned hemorrhoids or bleeding piles, from which he said the plaintiff suffered—to our mind a by no means insignificant or unimportant statement in this case, although not commented on in argument. Asked as an expert, whether if one sits down suddenly and strikes the coccyx or the sacrum, there was any probability of peritonitis if there was no infection, he answered that the probability was not strong, but there was a possibility, the possibility being of inflammation being started and reaching the peritoneum, which, however, he said, had no direct connection with the coccyx or sacrum. An intervening part must therefore be involved and infected to carry inflammation to the peritoneum. It might be possible, he said, that the laceration he found would produce neuresthenia, but he would not expect it to do so, and would not think it could produce it if for two or three years between the laceration and the neuresthenia the person enjoyed good health.

Dr. Babcock, also called for the plaintiff, had made two examinations of the plaintiff—one two months and one one month before the trial. He found, he said, a condition of neuresthenia, and he also found, on the second examination, a swollen or enlarged condition of the parts of the anterior surface of the coccyx. It felt, he says, like a part of fibrous tissue. He believed, he said, that this condition was traumatic, that some force or violence caused it.

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Dr. Babcock had known the plaintiff eight or ten years before, socially, and said she was then heavier, and only to a small extent anæmic. He said that the childbirth in 1906 described to him was abnormal, and it was possible that the condition found in her by him might have come from it, but that if, during the interval of eight or nine years, a woman had enjoyed good health for three or four years, that would cut down the possibility considerably, and would open up the case for another cause very largely.

Dr. Knudson, called for the defendant, who examined the plaintiff at her request, because she knew him to be the surgeon for the defendant, on October 29, 1903, two weeks after the accident, and on November 14, 1903 (at which time she said nothing of any peritonitis having intervened), and on January 21, 1904, when she did say that she had had inflammation of the left ovary and general peritonitis, and who applied to examine her again in February, 1904, and was refused, swore that he found at the first and the subsequent examinations, no fracture or dislocation of the coccyx or sacrum, no swelling and no external sign of wound or injury; that he found uterus inversion, but not of recent origin; that he thought her then anæmic and neuresthenic and easily upset.

He named as an expert several causes which might produce neuresthenia, such as disease of the genital organs, over-work, nervous strain, worrying and piles; but did not testify that he found the plaintiff suffering from piles, as did Dr. Harsha. He also said that severe traumatic injury might produce neuresthenia, but not such an injury as plaintiff claimed she had received, unless it had produced a fracture. He also said that without a fracture, a severe fall on the sacrum or coccyx could not produce peritonitis unless there was something intermediate already existing, such as a pelvic abscess.

Dr. Stowell was subpoenaed by the defendant. He declared himself an unwilling witness, but was told

by the court that he could not claim privilege because he had been consulted by the plaintiff voluntarily. He examined the plaintiff in the earlier part of 1906. He made a complete examination of the pelvic region. He found an old laceration of the neck of the womb, indicating it was from childbirth, and some indication of an inflammatory condition in the pelvis, and evidence that led to suspicion that there was some pus and adhesions there. He found nothing the matter with the coccyx or sacrum and nothing out of the way on the outside of the back. He said that in his opinion the adhesions or place that he diagnosed as a pus sac had nothing to do with any external violence; that he considered the plaintiff as a person of a neurotic type, and that in a person of a neurotic type the conditions in the genital organs that he had described would produce or emphasize neuresthenia. On cross-examination he reiterated his opinion, that the accident described by the plaintiff could not cause, although it might aggravate, neuresthenia, and that the laceration of the cervix which he found, although healed, was not left in a normal condition and might have aggravated neuresthenia, although he would not say that it would produce it.

Dr. Hall, Dr. Leaming and Dr. Price, to speak generally of their testimony, swore as expert medical men, that the injury described by the plaintiff, not being severe enough to produce a fracture or dislocation, could have had no relation to either the peritonitis or neuresthenia from which she claimed to have suffered. Dr. Hall swore that her described conduct immediately after the accident was entirely inconsistent with any serious injury to the coccyx.

To Dr. Price these questions were put and by him these answers returned:

“Q. Suppose a woman thirty-four years of age to be neurasthenic and nervous in tendency, and afterwards she was married and two or three years afterwards she had a child delivered with forceps and her

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womb was lacerated and the child died, what effect, if any, in your opinion, would that have upon a person of neurasthenic temperament?

A. I would have this opinion, that from those circumstances that she had had a child and had the neurasthenia and putting them all together I would say absolutely it was a very decided trend of causes, not only one, but several causes.

Q. Suppose she had a number of examinations after it, and a year ago this month the laceration was still found to be there, but in the meantime before that last examination that disclosed the laceration to be still there, she had had an injury in a railroad car when she was about thirty-four years old, to the coccyx and sacrum, and no fracture to either the sacrum or the coccyx, and shortly after that a case of peritonitis occurred which left a pus abscess over the right ovary, and she was neurasthenic all the time all along, and a year ago still had that laceration of the womb observable at the point of abscess and a rigidity there, what effect would you say, if you have an opinion on the subject, was there between the neurasthenic or nervous condition and the blow upon the coccyx with neither fracture nor dislocation?

A. There would be no relation."

We have given what seem to us salient points of the medical evidence. We have no intention of commenting on them further than to say that a consideration of them, with a very careful examination of all the testimony, connected with the refusal of an examination by the plaintiff at the trial, which was a matter for the jury and therefore for us to consider, and the severe and, as we think, unjustifiable attacks in argument on the medical experts who testified for the defendant, makes it impossible for us conscientiously to allow this verdict to stand on this record. As hereinbefore indicated, we think it is in amount against the weight of the evidence.

Complaint is made of the instructions. We do not

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think they contain reversible error. With instruction 7 we find no fault. Instruction 8, for greater caution, perhaps, might better have repeated in its last clause the limitation concerning the practical operation of the road which is found in the first clause, but it must be considered as a whole, and we do not find it erroneous.

Instruction 16 contains no incorrect statement of the law, but we think it is rather unhappily worded and confusing.

Instructions 8 and 9 we do not consider contain reversible error, but they would have been better had they more particularly defined and limited what the court meant by "consequences".

We do not find any error in the rulings on evidence. The case, in our opinion, was carefully tried by the trial court in this regard.

But for the reasons we have specified, the judgment is reversed and the cause remanded to the Superior Court for a new trial.

Reversed and remanded.

Ann Marren, Appellee, v. North American Union, Appellant.

Gen. No. 14,083.

1. **PRACTICE**—*when not error to strike special plea.* A special plea filed after the regular pleadings have been interposed is properly stricken when it has been so filed without leave of court.

2. **PRACTICE**—*when not error to strike special plea.* It is not error to strike from the files a special plea which is double and obnoxious to demurrer.

3. **PLEADING**—*what defenses not admissible under general issue.* In an action upon a fraternal benefit certificate the defense that a member was addicted to the excessive use of intoxicating liquor is not admissible under the general issue.

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4. EVIDENCE—*what does not tend to prove drunkenness.* The sole fact of residence in the Washingtonian home is inadmissible as evidence to prove drunkenness.

5. FRATERNAL BENEFIT SOCIETIES—*construction of insurance contract.* If ambiguity exists in an insurance contract the construction given to such contract will be most favorable to the insured.

6. FRATERNAL BENEFIT SOCIETIES—*what does not affect misrepresentation by applicant.* The fact that one in becoming a member of a fraternal benefit society falsely represented that he was not addicted to the excessive use of intoxicating liquors, will preclude recovery by the beneficiaries if his death resulted from the use of such liquors, notwithstanding under the rules of the order such member could not have been expelled therefrom without proof of "habitual" excessive use of such liquors.

7. VERDICT—*when set aside as against the evidence.* A verdict manifestly against the weight of the evidence will be set aside on appeal.

Assumpsit. Appeal from the Superior Court of Cook county; the Hon. WILLIAM H. MCSURELY, Judge, presiding. Heard in this court at the October term, 1907. Reversed and remanded. Opinion filed December 21, 1908.

R. E. HAMILTON, for appellant.

THOMAS TAYLOR, JR., and JAMES W. TAYLOR, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from a judgment of the Superior Court rendered upon the verdict of a jury, for one thousand dollars. The argument of appellant is principally directed to the proposition that the verdict and judgment are manifestly contrary to the weight of the evidence and contrary to law. This involves the rulings of the trial court in striking the additional pleas from the files and in overruling appellant's motion for a new trial.

John Marren was a member of appellant, a fraternal mutual benefit insurance company, which on February 7, 1900, issued to John Marren a contract of insurance in the sum of \$1,000, in which his mother,

the appellee, is named as the beneficiary. The declaration consists of two counts, in the first of which it is alleged that the contract of insurance was issued to John Marren by the Union, by which it agreed, in consideration that he while a member of the Union would comply with its charter, constitution, laws, rules and regulations, it would, at his death, pay the sum of one thousand dollars to his mother, the appellee; averred that John Marren was dead, and that during the time he was a member he did comply with the charter, constitution, laws, rules and regulations of the Union.

In the second count the contract of insurance is set forth in *haec verba*, including the application for membership, containing the medical examiner's report and John Marren's answers to questions put by the medical examiner and an undertaking to comply with the laws, rules and regulations of the Union.

Among the several clauses of the contract of insurance is the so-called "incontestable" clause, and as we shall hereafter comment upon its bearing upon the rights of the parties, we here quote its substance: "This contract shall be incontestable after two years from the date hereof, except for the non-payment of dues, assessments, fines or premiums, engaging in prohibited occupations or becoming habitually addicted to the excessive use of intoxicating liquors * * * contrary to the laws, rules and regulations of the association and the agreement of the member".

Appellant filed first a plea of the general issue December 30, 1905, and afterwards, on January 4, 1906, filed a special plea, setting forth a violation by the member, John Marren, of certain of the laws, rules and regulations of the Union, specifically mentioning them, and also charging that said John Marren was, for a long time during his membership, addicted to the excessive use of intoxicants, and that for several days prior to March 14, 1905, when he died, he was under their influence, and that his death was the re-

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sult of drunkenness. This special plea further avers that John Marren made false statements to the medical examiner, rendering the contract of insurance null and void.

The trial court struck the special plea from the files on the motion of appellee, because it was filed after appearance and the filing of the plea of the general issue, without first obtaining leave of court to place it upon the files. An examination of the record fails to disclose an order granting leave to file this special plea; nor is there anything in the record contradicting the statement of counsel when making the motion to strike, that the plea was filed without leave of court. The court did not, therefore, err in eliminating the special plea on the motion of appellee. Appellant, if it still desired to avail of the defenses claimed in the special plea, should have asked for leave to refile it. This was not done. Again, the special plea is double and obnoxious to a demurrer. It is not a good plea. The defense sought to be interposed was breach of the conditions of the contract of insurance by John Marren, resulting in its forfeiture. It was claimed that John Marren, before and since the issuing of the contract of membership, was addicted to the excessive use of intoxicating liquors. Such defenses are not admissible under a plea of the general issue. To be availed of they must be pleaded specially. The authorities so holding are numerous, and this rule is well settled by a uniformity of decision on the subject. *Ills. Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Am. Ins. Co. v. Egyptian Lodge*, 128 Ill. App. 164; *Modern Woodmen v. Davis*, 184 Ill. 236; *Concordia Fire Ins. Co. v. Bowen*, 121 Ill. App. 35; *Continental Ins. Co. v. Rogers*, 119 Ill. 474; *Metropolitan Life Ins. Co. v. Zeigler*, 69 Ill. App. 448.

As to the matters claimed to constitute defenses to appellant's liability under its contract of insurance, we think the so-called incontestable clause has no application. Such defenses consist of matters specially

excepted from the operation of that clause. These matters, however, in order to be available as a defense, should have been specially pleaded, however many of the matters so involved were admitted in evidence by the trial court under the general issue. The correctness of this ruling is not involved in this appeal, as appellee has not assigned cross-errors.

In no event were the admissions, at many times, of John Marren to the Washingtonian Home in Chicago, competent evidence, unexplained as to his condition as to sobriety or drunkenness at the several times of his admission and the purpose of his becoming an inmate and the course of his treatment while there. The fact of a person being at some time in the Washingtonian Home does not *ipso facto* raise a presumption that such person is addicted to the excessive use of intoxicants. Even under appropriate special pleading, the sole fact of residence in the Washingtonian Home would be inadmissible as evidence to prove drunkenness. Such fact does not dispense with proof necessary to establish as a fact the defense that John Marren violated the condition of his insurance by being addicted to the excessive use of intoxicating liquor.

Were the incontestable clause susceptible of two constructions, or were there any reasonable doubt as to its intended effect, it would be our duty, under well-settled legal doctrine, to adopt that construction which favored the upholding of the claim made under the insurance contract of which this clause is a part. But we do not regard this clause as at all ambiguous or susceptible of a dual meaning. Under appropriate special pleas the defenses endeavored to be interposed to the right of appellee to recover are admissible.

It is obvious, from the terms of the contract of insurance, the requirements of the rules of the Union and the statements in the medical examiner's report, that the Union would not insure against the excessive indulgence of the member in intoxicating liquor.

We think that the finding of the jury is so palpably contrary to the manifest weight of the evidence in the record, that the judgment of the Superior Court must be reversed and a new trial ordered.

It is impossible to escape the conclusion, from the greater weight of the evidence, that John Marren met his death as the result of an excessive indulgence in intoxicating liquors. That he was what is commonly known as a drinking man who went on "sprees", is but the reasonable deduction from the evidence of his immediate friends, who testified at the instance of appellee. The verdict of the coroner's jury and the statement of Dr. Lewke, the coroner's physician, who held the autopsy upon the dead body of John Marren—admitted with the consent of appellee, although a motion was later made to strike it out—conclusively establish as a fact that John Marren came to his death from alcoholism. Dr. Lewke stated that "on opening the body I found the lungs congested, the heart fatty, the liver fatty and congested, the kidneys degenerated and inflamed, and the stomach inflamed". Other medical men testified that the condition of the organs of John Marren as set forth by Dr. Lewke was the result of alcoholism. This evidence was fortified by the report of a committee of three members, appointed by the Union under its rules to inquire into the death of John Marren, and they reported that he died from alcoholism. This report was part of appellee's proof. Appellee attempted to prove by other medical testimony that the condition of the organs of John Marren might be attributable to other causes, such as "Bright's disease", but in view of all the facts we regard such opinions as unsatisfactory. On the other hand, a tacit admission by appellee of inebriety arises from the condition that such a defense is barred and the Union estopped from now seeking to escape the payment of the claim by reason of John Marren's use to excess of intoxicants, because Ryan,

the collector of the Union, who collected dues and assessments from John Marren, knew of his excessive indulgence in intoxicating liquors and of his resulting drunkenness, and appellee complains of the ruling of the trial judge in not permitting Ryan to testify concerning his knowledge of John Marren's drinking habits. It is therefore apparent from this evidence that John Marren came to his death as a result of the violation of that clause of his contract of insurance against the excessive use of intoxicants, which vitiated it and worked a forfeiture of all rights of the beneficiary thereunder. The medical examiner's report, signed by John Marren, contains the following: "I am not now addicted to the excessive use of intoxicating liquors. * * * Should I become so addicted * * * my so doing shall forfeit and absolutely terminate thereafter all right, interest, payment, benefits or privileges of myself * * * or beneficiaries without proceedings for expulsion or otherwise on the part of said association."

It is urged that Section 3 of Law 19 of the Union must control in this case, and that no rights can be held to be forfeited because the insured could not be tried or expelled from the Union for the excessive use of intoxicating liquors, but only for the "habitual" excessive use of such liquors. Whatever the rights of John Marren would have been in a trial under this rule, we do not think affect this case. The rule applied to a trial and expulsion. The representation of John Marren was, that at the time he made application for membership he was not addicted to the excessive use of intoxicating liquors, and he agreed that should he become so addicted all rights, benefits and payments should become forfeited both to himself and beneficiary "without proceedings for expulsion or otherwise". Expulsion, under the law of the Union last quoted, was not a condition precedent to a forfeiture under the terms of the insurance con-

Marren v. North American Union, 145 App. 375.

tract. Such proceeding was expressly and in terms waived by the member in his application for membership, which forms an integral part of his insurance contract.

It was sought to rebut the evidence of the defense concerning the drinking habits of John Marren, by calling his mother and brother as witnesses in rebuttal. Their testimony is highly unsatisfactory and in no way weakens the force of appellant's proof on this subject. The testimony of these witnesses was undoubtedly honest and true, but it did not touch the subject inquired about. They were gently led to the point of inquiry, but astutely avoided the subject in their responses. Mrs. Marren, the mother of John, the beneficiary named in the contract of insurance and the appellee, was asked, "What were his habits, if you know?" and answered, "His habits was good to me". The court then asked this question of appellee, "What were his general habits?" to which she answered, "Well, I don't know; he was nice going to his work and coming home". She also testified in rebuttal that "He always supported me; he was my support all my life. I never was hungry or cold, never". The testimony of the brother was of an equally negative character, remarkable principally for what he did not see, with the exception that he admitted that his brother John went on "sprees".

The pathos of the widowed mother's story and her lauding of the filial virtues of her dead son John, told in all probability in a touching manner, together with the—it may be assumed—somewhat forlorn appearance of the old woman who had in the death of her son John lost her sole support, was enough not only to stir the sympathetic feelings of the jury, but to so overcome their better judgment as to cause them to lose sight of the evidential facts material to be considered in weighing impartially the evidence and reaching a just verdict therefrom. The verdict impresses us as being the offspring of sympathy—an

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emotional verdict, which the evidence does not justify or sustain.

The judgment of the Superior Court is reversed and the cause remanded for a new trial in conformity with the views expressed in this opinion.

Reversed and remanded.

**Alma Glaefke, Appellee, v. Western Electric Company,
Appellant.**

Gen. No. 14,091.

1. JURISDICTION—*when court without, to order reinstatement of cause.* The court loses jurisdiction of a cause with the lapse of the term at which the final order of dismissal is entered and therefore it may not reinstate the same unless by order it has reserved its jurisdiction.

2. CORAM NOBIS—*what not error of fact.* To dismiss a cause upon the general call of a calendar, if it be an error, is an error of law and not of fact; such error cannot be corrected after the lapse of the term at which the order of dismissal is entered.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1907. Reversed. Opinion filed December 21, 1908.

HOLT, WHEELER & SIDLEY, for appellant.

No appearance by appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an undefended appeal.

Appellee sued appellant in an action on the case for personal injury, laying her *ad damnum* at \$20,000. On December 10, 1903, her declaration was filed, to which appellant on December 22, 1903, filed a plea of the general issue. On May 2, 1906, an order was en-

tered dismissing appellee's suit for want of prosecution and a judgment for costs entered against her.

On motion of appellee the Circuit Court on April 4, 1907, vacated the order of dismissal and judgment for costs and reinstated the cause upon the docket. Appellant entered its motion for a new trial, which was overruled. It then moved in arrest of judgment, which also being overruled, it prayed, procured, perfected, and now prosecutes, this appeal. It is assigned for error and argued that the order of reinstatement was erroneous as being without jurisdiction; that the trial court erred in refusing to find the issues for appellant and in refusing to hold as the law the following proposition tendered by appellant:

"The court holds as a proposition of law that under the facts and the evidence in this case the plaintiff has not made such a showing as entitles her to have her case reinstated, and the court finds for the defendant".

The motion filed by appellee was that the case be reinstated upon the calendar and that the court amend the record of the judgment so that it should appear that the case was dismissed on the general call of the docket instead of having been dismissed on the regular call for actual trial, and for such further amendments on the record "as shall be or seem fit" to be made in pursuance of said motions or either of them. An affidavit of J. A. Adams was read in support of the foregoing motions, which *inter alia* contains this contention: "Now this deponent insists that the said recital introducing said order and judgment is wholly erroneous and unfounded in point of fact; that acquitting the said clerk and all concerned from any imputation of a sinister nature, deponent nevertheless claims and insists that said judgment entry, in so far as the recital above set forth is concerned, is a false entry and ought to be amended to correspond with the actual fact, which is that this suit was dismissed and judgment rendered pursuant to said gen-

eral call and not upon any actual call of the case for trial”.

The record also contains an order of the Circuit Court authorizing a general call of cases on the law docket. In this order appears the following provision: “It is further ordered that the cases so called for trial * * * may for good cause shown to the court, on notice to the opposite party or his attorney, be reinstated within ninety days from date of said order”, etc. The order of dismissal was entered on May 2, 1906, and the order of reinstatement entered April 4, 1907, so that it is clear that appellee’s motion was not made within the time limited by the provision last quoted, and it is just as clear that the court had no jurisdiction to enter any order in the case eleven months after the final order of dismissal was entered. The court lost jurisdiction of the cause with the lapse of the term at which the final order was entered. *Barnes v. Henshaw*, 226 Ill. 605; *Gray v. Ames*, 220 *ibid.* 251.

The power of the court to interfere with the judgment at all rests in its right to proceed on motion to correct any error committed by the court not appearing in the judgment itself or involving any proceeding of either fact or law occurring upon the trial *aliunde* the record and which, when made known to the court, would have the effect to void or nullify its judgment. Such a motion serves the office and function of the common law writ of *coram nobis*, and is in the nature of a review by the trial court of the error alleged against its judgment. Such review must be limited to errors of fact, for as such power is conferred by section 66, chapter 110, R. S., the inquiry of the court must proceed in accordance with its provisions, and being in derogation of the common law, its provisions cannot be enlarged. Section 66 *supra* provides that “All errors in fact committed in the proceeding of any court of record, and which by the common law could have been corrected by said writ—*coram nobis*

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—may be corrected by the court in which the error was committed upon motion in writing made at any time within five years after the rendition of final judgment in the case, upon reasonable notice”.

If the court proceeded, in its order reinstating the cause, on the ground that it should not have dismissed the same, as it did, under the order for a general call of the law docket, such error was of law and not of fact, and therefore not reviewable by the trial judge. *Domitski v. Am. Linseed Co.*, 221 Ill. 161.

The record, however, discloses that the order complained about was neither amended nor changed in any particular. What the court did was to set aside the order of dismissal and reinstate the cause and restore it to the docket. This it had no power to do after the passing of the term at which the order of dismissal was entered and the cause finally disposed of. That order, being made without jurisdiction, is a nullity. As said in *Green v. Union Elevated R. R. Co.*, 118 Ill. App. 1: “Any errors in procedure were subject to review on appeal or writ of error from the final order of the Superior Court. They are not subject to review upon a motion to reinstate made after the expiration of the term when the trial court has lost jurisdiction. * * * The order of dismissal was a final order in the case. It disposed of the suit.”

Appellant has pursued, in every material particular, the method held in *Domitski v. Am. Linseed Co.* essential to present to the reviewing court the errors assigned on the erroneous action of the trial court on the motion to correct the final order of dismissal and reinstate the case on the docket, and is entitled to prevail in its appeal.

The judgment of the Circuit Court appealed from being erroneous, is reversed.

Reversed.

**Variety Manufacturing Company, Appellee, v. Mills
Novelty Company, Appellant.**

Gen. No. 14,095.

1. *INSTRUCTIONS—how motion for peremptory must be made.* A motion for a peremptory instruction is properly denied where it was neither made in writing nor accompanied by a written instrument.

2. *PRACTICE—power of court to submit special interrogatories.* The trial court may in its discretion submit interrogatories to the jury which call for their findings of specific facts at the request of either party or at the court's own initiative.

Assumpsit. Appeal from the Municipal Court of Chicago; the Hon. EDWARD A. DICKER, Judge, presiding. Heard in this court at the October term, 1907. Affirmed. Opinion filed December 21, 1908. Rehearing denied January 7, 1909.

ADLER, LEDERER & SCHOENBRUN, for appellant.

BOLEN & STEWART, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The Municipal Court rendered a judgment for \$877 in favor of appellee against appellant on the verdict of a jury, in an effort to reverse which this appeal is prosecuted.

Appellant argues, as reasons for reversal, that the contract sued upon was not its contract, but the obligation of the Mills Edisonia Company; that the Municipal Court erred in its rulings upon the evidence, and that the judgment is contrary to the law and the evidence.

We are met at the threshold of this cause with the embarrassing fact that there is a similarity between the names of the two corporations involved in the liability sought to be enforced; they are both "Mills" corporations, and other elements of confusion lie in the fact that Herbert S. Mills was president of both

Variety Manufacturing Co. v. Mills Novelty Co., 145 App. 387.

corporations and that other persons were officers and interested in each of these corporations, and that both of them had some interest in the building in which the folding doors were to be installed by appellee. It is fairly inferable from the evidence of both contestants, that the "Edisonia" Company had no financial reputation established in the business community, while the "Novelty" Company, appellant, had.

The evidence demonstrates that the contract was made by appellee with appellant. Morehouse, the architect of the building, was instructed by Mills, the president of appellant, to have the contract made in the name of appellant and Law, the purchasing agent of appellant, with the knowledge and authority of its president, made the contract with appellee for appellant. This contention of appellant smacks very much of an attempt to shift the burden of a binding obligation from a solvent concern upon a corporation of doubtful pecuniary responsibility.

The next question is, did appellee perform its contract sufficiently in accordance with its terms to entitle it to recover the amount due under the terms of the contract. The evidence shows that the doors contracted to be installed in appellant's building were large and not of a usual or ordinary character. They were manufactured under a patent and were supposed to work automatically, and therefore required a nicety of adjustment which would not admit of a departure from the exact measurements of the spaces they were intended to inclose. The exact dimensions of these openings could not be ascertained except by actual measurement, and measurements could not be made until the openings were completed by the contractors having that part of the work in charge. As soon as the openings were completed, the measurements were made and the doors delivered at the building to be put in place within a reasonable time thereafter.

Appellee is not responsible for delays in its work occasioned solely by the act of a preceding contractor,

and is only required to proceed with reasonable dispatch and to furnish the doors as soon after the openings were finished ready for measurement as it could in the exercise of due diligence.

The evidence sustains appellant in its claim that the delays which occurred did not result from any dereliction on its part, but establishes, on the contrary, as a fact that appellee proceeded with all reasonable dispatch to install the doors after it was able to procure the necessary measurements.

A careful examination of the evidence fails to disclose any erroneous rulings of the court affecting the merits or the justice of appellant's defenses.

The motion of appellant to instruct a verdict in its favor was not made in writing, nor was any written instruction tendered. The ruling of the court may not therefore be reviewable on this appeal. *W. C. St. Ry. Co. v. Foster*, 175 Ill. 396. It may, however, under the Municipal Court Act, be unnecessary to make the motion in writing or tender an instruction, as that Act authorizes that court to instruct the jury orally. Be that as it may, it is clear that at the close of all the evidence, when the motion was made, the evidence presented questions of fact for solution, which solution was the function of the jury and not the duty of the court.

When appellee started to install the doors, the architect of appellant interfered and stopped the workmen of appellee from further proceeding, and took into his hands the task of completing the work. The expense of so doing was allowed by the jury as a credit to appellant, the verdict being for the contract price less such expense. To this we see no cause of exception by appellant. It was in its favor.

The answers of the jurors to the special interrogatories propounded to them settle all the disputed questions of fact in favor of the appellee, and we are not only unable to say from the evidence in the record that such findings are not supported by a preponder-

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ance of the evidence, but, on the contrary, are of the opinion that the findings of ultimate fact by the jury are in harmony with the greater weight of the evidence. However, it is assigned for error, although not pressed upon us in argument, that the trial court erred in giving to the jury the special interrogatories propounded to them for answer. It is a well-settled rule of procedure in this jurisdiction that the trial court may, in its discretion, submit interrogatories to the jury which call for their findings of specific facts at the request of either party, or on the court's own initiative. Voigt v. Anglo Am. Provision Co., 202 Ill. 462; P. C. C. & St. L. Ry. Co. v. Bovard, 121 Ill. App. 49.

And as said in Town of Cicero v. Bartelme, 114 Ill. App. 9, "We have carefully examined the evidence in the record, and we cannot say that the finding of the jury * * * is against the evidence or is not supported by sufficient evidence". Neither can we say from this record that the judgment of the Municipal Court does not mete out justice to the parties upon the merits of the case.

The judgment of the Municipal Court is affirmed.

Affirmed.

Frank Bettis, Appellee, v. Chicago Coated Board Company, Appellant.

Gen. No. 14,100.

1. MASTER AND SERVANT—*when latter cannot recover.* A servant is not entitled to recover for injuries sustained while in the service of his master unless he has established that he did not know of the defects which caused his injury and did not have equal opportunities with his master of knowing thereof at the time he was so injured.

2. CONTRIBUTORY NEGLIGENCE—*when servant guilty of.* A servant who undertakes to select his own implements and chooses one that

is defective, is not in the exercise of ordinary care and cannot recover for an injury resulting from such defect.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1907. Reversed with finding of fact. Opinion filed December 21, 1908. Rehearing denied January 7, 1909.

HORTON, BROWN & MILLER, for appellant.

HARRY R. HURLBUT, SAMUEL B. KING and JULE F. BROWER, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The relationship of the parties at the time plaintiff sustained injuries to his person, compensation for which a jury rendered a verdict and the trial court entered a judgment for \$2,500, was that of master and servant.

The declaration originally consisted of five counts, but the court, by instruction, eliminated the second, third, fourth and fifth counts from the cause, and the case was submitted to the jury on the first count.

The negligence averred in the first count is, that defendant's duty was to furnish plaintiff with a safe place in which to work, in smoothing out wrinkles in the paper which was wound about rollers in a machine used by him for that purpose, and that defendant was negligent in that it neglected to perform that duty by furnishing plaintiff a board which was defective, in that it had in it longitudinally a crack or split, of which defect plaintiff had no notice, but of which defendant either had actual notice, or in the exercise of reasonable care, might have had such notice.

The evidence is substantially to the effect that at the time of plaintiff's suffering the injury complained about, he was trying to smooth out a wrinkle that appeared in the paper upon the roll; that he picked up a piece of board and used it in an endeavor to accom-

plish such purpose. The manner of so doing was by putting one end of the board down upon the floor and holding it in position, with the foot, and then applying force to the other end of the board, which had the effect of smoothing out the wrinkle. In the machine at which plaintiff was at work, there were two rollers, one above the other, upon which the paper was rolled. These rollers were so worked that when revolving any substance placed between them large enough to engage the surface of both would be drawn in and through them.

At the close of plaintiff's proofs and again at the close of all the evidence, defendant made a motion in writing and tendered a written instruction with each motion, that the jury be instructed to find a verdict in favor of the defendant. Both these motions were denied and exceptions to the ruling of the court preserved. The court's rulings in this regard are likewise assigned upon the record for error, and while other assignments of error appear upon the record and are urged upon us in argument, we shall confine our reasons in the conclusions to which we have arrived to the ruling of the court in refusing to instruct a verdict for defendant, as asked at the close of all the proofs.

Plaintiff's hand and arm, the proof shows, were injured while plaintiff was using the board, with a crack in it, in an endeavor to smooth out a wrinkle in the paper which he was engaged in rolling; that the wrinkle in the paper caught in the crack in the board, which had the effect of throwing the board up and in some way, not clearly explained, caused plaintiff's hand to be caught between the rollers and drawn between them.

The case of plaintiff rests in the charge that defendant furnished him a board to work with which was defective, knowledge of which defect is imputable to defendant. There is no charge that there was anything out of repair in the rolling machine, or that it

was not of approved construction and safe to work at by persons exercising ordinary care in so doing. Therefore any testimony on the part of plaintiff indicating any defect in the machine was incompetent, and therefore should have been excluded. The testimony of plaintiff unquestionably establishes the fact that boards used to straighten out wrinkles in the paper occurring during the process of rolling, were not furnished by defendant, nor was any other implement furnished for that purpose. It was customary to use such a board in rolling paper when smoothing out wrinkles. In this instance defendant did not furnish the board, which plaintiff insists was defective. Petrie, the foreman of defendant, did not instruct plaintiff to use the board he did use, or direct him to use any particular board. Plaintiff selected his own board, both on the occasion when he was injured, as well as at other times when he smoothed out wrinkles. The board used by plaintiff at the time of his injury, he picked up off the floor from underneath the machine on which he was at work, where it was lying, without making any particular examination of it to ascertain its condition. The testimony of plaintiff makes it very doubtful whether the board was cracked at the time he started to use it, or was cracked by the machine while being used in it to straighten or smooth out the wrinkle in the paper being rolled. However this may be is unimportant, for it is clear that defendant was not responsible for the board used, whether in a defective or good usable condition.

The rule governing this case is stated in *E. J. & E. Ry. Co. v. Myers*, 226 Ill. 358, where the court say: "Still, the appellee was not entitled to recover in this case unless he established that he did not know of such defects, and did not have equal opportunities with appellant of knowing thereof at the time he was injured". This rule was established by the court in many of its preceding decisions, notably, *Goldie v. Werner*, 151 *ibid.* 551; *Howe v. Medaris*, 183 *ibid.*

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288; Lake Erie & Western R. R. v. Wilson, 189 *ibid.* 89; Armour v. Brazeau, 191 *ibid.* 117; Montgomery Coal Co. v. Barringer, 218 *ibid.* 327; and McCormick Harvester Machine Co. v. Zakzewski, 220 *ibid.* 522.

The board used by the plaintiff was not furnished by defendant, nor was the plaintiff directed as to the manner of its use by its foreman, or any other servant of defendant. Nor was the defect in the board, if any existed, known to defendant. Neither was such knowledge imputable to it. Plaintiff selected his own board, and if he used one that was defective, he was not in the exercise of reasonable care in so doing, but was guilty of negligence which resulted in his injuries. The doctrine of Goldie v. Werner, *supra*, has been adhered to by this court in International Packing Co. v. Cichowicz, 107 Ill. App. 234; Casey v. Daugherty, 118 *ibid.* 134; and Dalton v. Ogden Gas Co., 126 *ibid.* 502.

The motion to direct a verdict in favor of defendant is in the nature of a demurrer to the evidence. As the proof then stood plaintiff had failed to establish the negligence charged against defendant in his declaration, and therefore was not entitled to recover. In so far as such proof may have tended to establish negligence other than that charged in the declaration, it was inadmissible, and therefore not competent to be considered in determining its weight. The trial court erred in not directing the verdict requested by defendant, at the close of all the proofs. The judgment of the Circuit Court is therefore reversed with a finding of fact.

Reversed with finding of fact.

**Carrie J. Billingsheimer, Appellee, v. William F. Scott
et al., Appellants.**

Gen. No. 14,107.

INTEREST—what not unreasonable and vexatious delay of payment. It is not an unreasonable and vexatious delay of payment to refuse to satisfy a claim where there is an honest and reasonable dispute with respect to its validity and propriety.

Assumpsit. Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1907. Affirmed on remittitur. Opinion filed December 21, 1908.

**WILLIAM P. SHOCKEY, ORLANDO W. KEATLEY and
BENJAMIN McWILLIAMS, for appellants.**

PARKER & HAGAN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The plaintiff, and the defendant William F. Scott, at the time of the occurrences resulting in the contentions appearing in this record, sustained the relationship to each other of patient and doctor. Dr. Scott attended the plaintiff when she suffered from a miscarriage. Just prior to this time Dr. Scott's wife, his co-defendant, had been delivered of a living child. In the case of these two mothers nature seemed to work at cross purposes. The mother of the immature and lifeless child had an abundant supply of nature's infant nourishment, while through the lacteal ducts of the mother of the living child no needed nourishment flowed. Dr. Scott's child was puny, in consequence, and so ill nourished that its life was threatened with early extinction. In his perplexity and anxiety for the life of his child, Dr. Scott appealed to the plaintiff to suckle it and to give the child of the abundance of nourishment which she had and of which the child

stood in sore need to save its life. Plaintiff took the child and nursed it, so that it became strong and healthy from the maternal sustenance which it extracted from her. Now the plaintiff claims that she cared in this way for the child of defendants under an express agreement that she should be paid \$15 per week for such services. On the other hand, Dr. Scott denies that any such agreement was made, but insists that plaintiff agreed to accept as a requitement for her services his professional attendance and care and the relinquishment of a claim for borrowed money which Dr. Scott had against her husband. The cause was tried at *nisi prius* with a jury, and a judgment of \$762.08 entered against defendants on the verdict of the jury. The common counts and a plea of *non assumpsit* embrace all the pleadings in the case. It is contended that defendants should have been permitted to recoup the amount due for Dr. Scott's services under the plea of the general issue; that the judgment is contrary to the preponderating force of the evidence; and that the court erred in its rulings upon the evidence and in its instructions to the jury.

Whether defendants could recoup or put in evidence a set-off or counter claim under their plea of *non assumpsit* against the claim set up by plaintiff, we are not called upon to decide, for the reason, clearly apparent, that there is naught in the record which calls for such ruling. The abstract of the record fails to disclose that any evidence was proffered of any counter claim by defendants, either by way of recoupment or set-off. The cause was defended upon the theory that the agreement to pay plaintiff for her services \$15 per week was never made, and all the evidence of defendants tends in that direction. A reading of the evidence fails to disclose any ruling of the learned trial judge upon the evidence which injuriously affected the rights of defendants or curtailed the defense which they sought to interpose. An exam-

ination of the instructions fails to disclose any infirmity of law necessitating a re-trial of the case.

The judgment appealed from was entered on the second trial of the cause. On the first trial plaintiff recovered and that judgment was by the Branch Court reversed and a new trial awarded because of improper remarks of plaintiff's counsel in his address to the jury. See case General Number 10767, opinion by Mr. Justice Baker, filed March 1, 1904, and not reported. In this opinion it is intimated that the amount of the judgment was excessive, as the jury awarded compensation at the rate of \$25 per week in the face of the testimony of plaintiff that she was to receive the lesser sum of \$15 per week for her services. We are of the opinion that the judgment appealed from is also excessive in that it includes interest upon the amount of plaintiff's claim on the basis of \$15 per week. The evidence fails to show that defendants unreasonably or vexatiously withheld the amount due plaintiff. We gather from the proofs that the disagreement between the parties is an honest one, and in view of the evidence in this record and the first verdict rendered in the case, we cannot say that the defendants vexatiously or unreasonably withheld payment. Plaintiff nursed the child of defendants from June 25, 1896, to February 22, 1897, a period of thirty-four weeks lacking one day. Plaintiff is consequently limited in her right to recover to that time. At \$15 per week the amount due would be in round numbers \$508.

The judgment of the Circuit Court will therefore be affirmed on a *remittitur* from the amount of the judgment of \$254.08 within five days; otherwise the judgment will be reversed and the cause remanded for a new trial.

Affirmed on remittitur.

CASES
DETERMINED IN THE
THIRD DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1908.

Riley Hilton, Appellee, v. Otis Slater, Appellant.

APPEALS AND ERRORS—*when pro forma reversal will be entered.* A reversal will be *pro forma* entered where the appellee fails to file a brief in compliance with the rules.

Action commenced before justice of the peace. Appeal from the County Court of Shelby county; the Hon. CALVIN GREEN, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

CHAFEE & CHEW, for appellant.

No appearance by appellee.

PER CURIAM. Appellee has filed no brief in compliance with the rules of this court and accordingly the judgment is reversed *pro forma* and the cause is remanded.

Reversed and remanded.

Lulu Gibson, Appellee, v. School Directors of District No. 72, Appellants.

1. **APPEALS AND ERRORS**—*when sufficiency of evidence not open to review.* In the absence of the abstract showing an exception to the finding of the court, the question of the sufficiency of the evidence to sustain such finding is not open to review.

Gibson v. School Directors of District No. 72, 145 App. 398.

2. **APPEALS AND ERRORS**—*when no questions of law presented for review.* If a case has been tried by the court without a jury and no propositions of law have been presented, no questions of law are saved for review.

Action commenced before justice of the peace. Appeal from the Circuit Court of DeWitt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

JOHN FULLER, for appellants.

INGHAM & INGHAM, for appellee.

PER CURIAM. This action was brought by appellee against appellants to recover for services as teacher in a district school. The case was originally brought before a justice of the peace and upon appeal to the circuit court, was tried by the judge without a jury. Judgment was rendered in favor of the plaintiff for \$66.80, from which the defendants appeal.

It does not appear from the abstract of the record filed by appellants that any exceptions were taken to the findings of the court upon the issues in favor of appellee. The sufficiency of the evidence to support such findings cannot therefore be inquired into by this court. The judgment appears to be regular and in accordance with the finding. No propositions having been presented to the court for its action, no questions of law are presented for review.

The judgment of the circuit court is therefore affirmed.

Affirmed.

**John H. Savage, Plaintiff in Error, v. Chicago & Alton
R. R. Co., Defendant in Error.**

INSTRUCTIONS—*when peremptory properly given.* In an action for death caused by alleged wrongful act, a peremptory instruction is properly given if after a careful consideration of all the evidence adduced by the plaintiff, together with all reasonable inferences which can be properly drawn therefrom, the same does not fairly tend to establish that the proximate cause of the death of the plaintiff's intestate was the failure of the defendant to exercise due care as charged in the declaration.

Action in case for death caused by alleged wrongful act. Error to the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

JOHN E. POLLOCK and J. BERT MILLER, for plaintiff in error.

BRACKEN, YOUNG & PEIRCE, for defendant in error; F. S. WINSTON, of counsel.

PER CURIAM. This is an action in case by plaintiff in error as administrator of the estate of Lewis H. Miller, deceased, against defendant in error, for recovery of damages for the death of said Miller who was killed by a switch engine in the yards of defendant, at Joliet, while in its employ. At the close of the plaintiff's evidence the trial court directed a verdict of not guilty, and rendered judgment thereon in bar of the action. To reverse such judgment this writ of error was sued out by the plaintiff.

The first additional count of the declaration charges that Miller was at the time of his death in charge of the round-house of the defendant at Joliet, and that as such it became his duty in the night time to superintend and direct the placing of an additional engine to a certain passenger train which had just then arrived on the north bound track; that it became neces-

sary in order to permit the additional engine to be run north over a switch to the north bound main track and backed down to the hind end of the passenger train, to detach the engine of the passenger train therefrom and run it north past such switch, where a siding entered the north bound track from the east; that while Miller was engaged in said duty, the servants of the defendant in charge of a certain switch engine backed the same southward on the south bound main track, in the night time, and that because of their negligence in improperly managing said engine, and in failing to have a switchman or other employe on the rear foot board of the same, said engine ran over said Miller and killed him. Other counts charge that no proper lookout was kept by the engineer and others in charge of the switch engine and that the head light on the rear end thereof was not properly lighted.

The evidence shows that the defendant was operating a double track railroad running north and south through Joliet, the west track of which was known as the south bound track and the east track as the north bound track, and that there was a siding east of the north bound track; that Miller had been round-house foreman for the defendant for about four years, and that one Norton was night round-house foreman; that on the day he was injured, Miller and the yard master jointly received an order from Bloomington, directing them to have engine 32 ready to be attached with engine 41 as a double head to train No. 4 from Joliet to Chicago, which would reach Joliet at 7:30 P. M., and to put engine 32 next to train No. 4. Pursuant to such order Miller placed engine 32 on the siding, and at about 7:30 o'clock, together with the yard master and Norton, went to the place where the double header was to be placed on the passenger train, and awaited its arrival. Upon the arrival of said passenger train from the south on the north bound track, the train was stopped just before the engine thereon reached the switch leading to the siding upon which engine 32 stood. The

yardmaster cut regular engine 41 off the east end of the passenger train, and the same was then run down north over the switch, and thereupon engine 32 was run off the siding past said switch on to the north bound main track and backed down to the head of the passenger train. Engine 41 was then backed down to the head end of engine 32. Norton then left Miller standing between the two main tracks. Between the time that engine 41 was cut off the passenger train and engine 32 was backed down to said train, a switch engine backed down the south bound main track and ran over Miller, at a point about opposite engine 32. He was instantly killed. His body was found lying across the east rail of the south bound track, in between the rails, with his legs outside of the east rail. The switch engine was at the time running about two miles an hour.

The record is silent as to what the deceased was doing or what occurred at the time he met with his death. How he happened to be run over is altogether a matter of conjecture, as there were no eye witnesses to the accident. There was evidence tending to show that there was no switchman on the rear foot-board of the switch engine. The negligence relied upon in argument as a basis of recovery seems to be the failure of the engineer of the switch engine to observe that the deceased was upon or so near the south bound track as to be in danger. It is urged that by the exercise of ordinary care he would have known of the presence of the deceased in time to have stopped the engine and avoided injury to him.

The burden was upon appellant to establish by the greater weight of the evidence that the engineer was thus negligent, and that this was the proximate cause of the death of his intestate. While the surrounding circumstances may have been sufficient to create a bare suspicion or inference that such was the case, we are of opinion, after careful consideration of all the evidence adduced by the plaintiff, together with all reasonable inferences which can be properly drawn

therefrom, that the same does not fairly tend to establish that the proximate cause of the death of Miller was the failure of the engineer to exercise due care as charged in the declaration, and that the jury could not without acting unreasonably, so find. It follows that the trial judge properly directed a verdict for the appellee, and that the judgment based thereon should be affirmed.

Affirmed.

Elick Rockwell et al., Plaintiffs in Error, v. Martens-Leary Co., Defendant in Error.

SALES—*what not competent to affect bill of sale.* In the absence of ambiguity or uncertainty, parol evidence is inadmissible for the purpose of showing that other property not answering the description in the bill of sale was included or intended to be included therein.

Assumpsit. Error to the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

WELTY, STERLING & WHITMORE, for plaintiffs in error.

CHARLES I. WILL and BARRY & MORRISSEY, for defendant in error.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in assumpsit by plaintiffs in error against defendant in error, for the recovery of damages resulting from an alleged breach of warranty of the title to certain chattel property purchased by them from the defendant in error.

The first count of the declaration alleges the execution by the defendant to the plaintiff of a bill of sale conveying "One (1) saw mill complete with all belts

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and attachments being the same saw mill with belts and attachments that formerly belonged to one John Aspel''; that thereafter one John Aspel replevied from them a vise, post drill, blacksmith forge, block and tackle with rope and pulleys, two chains, a log wagon, etc.; that after the commencement of the replevin suit by Aspel the plaintiff served notice upon the defendant to defend said suit; that the same was finally decided against the plaintiffs, whereby they lost the property in question, and in addition thereto were compelled to pay attorney's fees and costs.

The second count alleges in addition, that at the time of the execution of said bill of sale, the defendant then and there represented to the plaintiffs that the property therein described comprised and included the property replevied. The defendant by its special plea averred that the question as to what was included in the description employed in the bill of sale was litigated upon the trial of the replevin suit, and determined adversely to the contention of the plaintiffs and that judgment was rendered therein in favor of Aspel, which judgment was still in full force and effect. To such plea the plaintiffs replied that at the time of the execution of the bill of sale the defendant was asked what property was comprised in and included in the description quoted, and that the plaintiffs then and there answered that the property afterwards replevied was included therein, and that by reason of the premises the defendant should be estopped to assert the contrary. A demurrer was sustained to said replication, and the plaintiffs having elected to abide thereby, judgment was rendered against them in bar of action and for costs. They thereupon sued out this writ of error.

Waiving the question whether there was an estoppel by verdict in the replevin suit, we are of opinion that the demurrer to the replication was properly sustained, for the reason that parol evidence was inadmissible for the purpose of showing that other prop-

erty not answering the description in the bill of sale was included or intended to be included therein. All verbal agreements made before or at the time of the execution of a written contract, concerning the subject-matter thereof, are conclusively merged into the written contract and cannot be added to or changed by parol evidence. *Hill v. Hatfield*, 72 Ill. App. 534.

Plaintiffs in error deny in argument that they are seeking to vary or enlarge the terms of the bill of sale, and assert that they seek merely to put the same construction upon its general terms as the parties themselves did at the time of the execution of the instrument. The words employed in the present contract are neither ambiguous, doubtful nor uncertain. It is clear that the property replevied could not under any reasonable construction be held to be included therein. The rule that where the terms of a contract are uncertain, and the parties have by their conduct placed a reasonable construction thereon, such construction will be adopted by the courts, is therefore inapplicable. The judgment of the circuit court is affirmed.

Affirmed.

**M. J. Wolford, Trustee of Frank Lindley, Bankrupt,
Appellee, v. John Rusk, Appellant.**

NEGOTIABLE INSTRUMENTS—*when equitable defenses may be interposed.* The release of a guarantor may be interposed by him as a defense against one who acquires the note upon which the guaranty appears, after the maturity thereof.

Action commenced before justice of the peace. Appeal from the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

ACTON & ACTON, for appellant.

Wolford v. Rusk, 145 App. 405.

WALTER C. LINDLEY, for appellee; L. T. ALLEN, of counsel.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This action was originally brought against Rusk and Headlee, before a justice of the peace, and then taken by appeal to the circuit court. Pending the litigation Lindley became bankrupt, and Wolford, trustee, was substituted as plaintiff, and the suit was dismissed as to Headlee. Upon a trial before the circuit court without a jury, judgment was rendered against the defendant for \$103.50. The note which is the basis of the suit was executed and delivered by Rusk to Headlee and matured September 27, 1904. On April 7, 1904, Rusk hypothecated the note as security for a loan and at the same time endorsed the same as follows: "I guarantee the payment of this note at maturity. John Rusk."

The loan was afterwards paid by Rusk and the note in question returned to him. After its maturity it was sold to a third party, who, simultaneously with the delivery of the note to him, executed to Rusk a separate written agreement that Rusk should not be held liable upon the note in any way. Lindley afterward purchased the note with no actual notice of such written agreement. It is contended by appellant that having purchased the same after maturity, Lindley took the note dishonored and with notice and that Rusk as endorser and guarantor is entitled to interpose the written agreement in question as a defense the same as he could against the party to whom he sold the note; while appellee contends that Lindley took the same free from any latent equities existing between the endorser and endorsee.

It is well settled that latent equities between intermediate parties cannot be set up against a purchaser after maturity (2 Rand. Com. Paper No. 675), and that only those defenses that grow out of the relations

of original parties to the instrument can be interposed. *Bank v. Texas*, 87 U. S. 72. We are of opinion that the guaranty of the note by appellant may be properly regarded as a distinct and independent substantive undertaking to which appellant and the third party accepting the note upon the credit thereof were original parties. 1 *Dan. Neg. Inst.*, 669. It follows that the contemporaneous agreement of such third party releasing appellant from liability was sufficient to defeat recovery upon the note in the hands of Lindley, who acquired the same after maturity.

The rule sought to be invoked by counsel for appellee that where one of two innocent parties must suffer a loss by reason of the fraudulent act of a third party, the loss must fall upon the one who placed in such party's possession the means by which he was enabled to perpetrate the fraud, is not applicable, there being no claim that actual fraud was either perpetrated or intended by the transaction. Lindley was manifestly not one of two innocent parties within the meaning of the rule stated. Under the law he took the note when it was dishonored, and as has been said, subject to all latent equities between the original parties.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Geddes-Brown Shoe Company, Appellant, v. Henry C. Suttle, Assignee, Appellee.

1. **STATUTE OF LIMITATIONS**—*what does not toll running of.* A voluntary assignment for the benefit of creditors and the appointment of an assignee does not toll the running of the Statute of Limitations against an open account.

2. **VOLUNTARY ASSIGNMENTS**—*when objections to report of assignee properly stricken.* Objections to the report of an assignee

Geddes-Brown Shoe Co. v. Suttle, 145 App. 407.

interposed by a creditor whose claim is outlawed are properly stricken from the files.

Objections to assignee's report. Appeal from the County Court of De Witt County; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

MONSON & GRAY, for appellant.

E. J. SWEENEY and L. O. WILLIAMS, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from the order of the County Court refusing to strike from the files the objections of appellant to the report of appellee as assignee of one Glazebrook, who made a voluntary assignment to appellee under the statute, for the benefit of his creditors, on February 8, 1898. On August 29, 1898, appellee filed in the County Court a report of claims filed against his insolvent, among which appeared that of appellant, in the sum of \$170.70, but upon which he reported that according to the insolvent's books there should be allowed a credit of \$169.79. On September 5, 1907, appellant filed a petition asking that appellee be cited to report his acts and doings as such assignee. Pursuant thereto, on January 3, 1908, he filed his report showing that he had paid claims slightly in excess of the proceeds of the assets coming into his hands, but that he had paid nothing upon the claim of appellant. Appellant filed objections to said report, alleging that the same was neither full, true nor correct; that credit was taken for claims paid which had never been filed, and that others were paid without authority of law or order of court. The objections, upon motion of appellee, were stricken from the files, for the reason among others, that the claim of appellant was barred by the Statute of Limitations. Such ruling of the court was proper. The Statute of Limitations began to run against appellant's claim prior

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to the assignment by Glazebrook. The last item of the account bears date October 21, 1897, while the assignment was not made until February, 1898. The appointment of an assignee did not affect the running of the statute. *White v. Meadowcroft*, 91 Ill. App. 293; High on Receivers, Sec. 135. The account was therefore outlawed on October 21, 1902. The contention of appellant that the statute did not run because the relation of trustee and *cestui que trust* existed between the parties, is untenable. A trust to be exempt from the Statute of Limitations must be a direct trust. It must be exclusively within the jurisdiction of a court of equity and the question touching it must arise between the trustee and the *cestui que trust*. *Beers v. Myers*, 28 Ill. App. 653; *Hayward v. Gunn*, 82 Ill. 385. A county court is not by the Voluntary Assignment Act vested with general chancery powers and jurisdiction (*Preston v. Spaulding*, 120 Ill. 209), nor can the claim be said to have been exclusively within the jurisdiction of the County Court. Appellant could have maintained an action at law against Glazebrook at any time prior to the outlawry of the claim.

The judgment of the County Court was warranted and is affirmed.

Affirmed.

**Gottfried Gorenflo et al., Appellees, v. L. P. George
and James P. Woodside, Appellants.**

REPLEVIN—*when defendant estopped to deny possession.* One who pretends to have levied a distress warrant upon a field of corn is thereby estopped, in an action of replevin to recover such corn, from denying having taken possession thereof, and this notwithstanding the levy may not have been made in strict conformity with law,—no rights of third parties being involved.

Replevin. Appeal from the Circuit Court of Christian county;

Gorenflo v. George, 145 App. 409.

the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

FRANK P. DRENNAN, JAMES A. TAYLOR and LESLIE J. TAYLOR, for appellants.

J. C. and W. B. McBRIDE, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit in replevin by appellees against appellants. The declaration consists of the *cepit* and *detinet* counts, to which the defendants pleaded *non cepit* and *non detinet*. Judgment was rendered upon the verdict of the jury in favor of appellees.

The evidence discloses that appellees were tenants of appellant Woodside, who caused a distress warrant to be placed in the hands of appellant George, a constable, to execute. George went to a field where Gorenflo was husking corn, and read the warrant to him, whereupon Gorenflo inquired whether that meant for him to quit gathering the corn, to which George replied that it meant he must quit. George then endorsed upon the warrant a return reciting that he had in behalf of Woodside distrained upon the corn in the field and that in a neighboring crib. No custodian of the property was appointed, nor were any notices of the levy posted. The property was afterwards replevied by appellees.

It was insisted that the acts of George were not sufficient to constitute a valid levy, and that appellant Woodside was neither in the actual nor constructive possession of the property at the time the present suit was instituted. The endorsement of George upon the distress warrant, and the return of the same into court, was sufficient to estop Woodside to deny that he by his agent had taken possession of the property in controversy. No rights of third parties were involved. In serving the warrant George, although an officer, was acting but as the agent of Woodside. *Alwood v. Mans-*

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field, 33 Ill. 452. Notwithstanding the levy may not have been in fact such as is required by law, appellants by their acts induced appellees to believe that a levy had been made. The rule that where a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that such state of facts does in truth exist, is therefore applicable. 16 Cyc. 680; Vail v. Insurance Co., 92 Ill. App. 655; S. C. 192 Ill. 567; Hefner v. Vandolah, 57 Ill. 520; Wheeler v. Barrett, 70 Ill. App. 222.

The evidence discloses that no rent was due to Woodside at the time the distress warrant was issued. The levy of the same therefore constituted an unlawful taking of the property, and no demand was necessary before bringing suit. The judgment of the Circuit Court is affirmed.

Affirmed.

John Klick, Appellant, v. Edward Boost, Appellee.

1. **EVIDENCE**—*what incompetent as hearsay.* A letter containing the unsworn statement of one not a party to a cause is mere hearsay and properly excluded.

2. **INSTRUCTIONS**—*when upon credibility of witnesses, properly refused.* Where both parties to a cause are individuals, an instruction which singles out one of them and directs the jury with respect to judging of his credibility, is erroneous.

Assumpsit. Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the May term, 1908. **Affirmed.** Opinion filed November 17, 1908.

BEACH, HODNETT & TRAPP, for appellant.

HUMPHREY & ANDERSON and DONALD McCORMICK, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in assumpsit upon the common counts, by appellant against appellee. Judgment was rendered upon a trial by jury in favor of the defendant and against the plaintiff for costs. The bill of particulars filed with the declaration recites that the defendant agreed that if the plaintiff would sell to the defendant all his interest in a mercantile business then conducted by them, and formerly conducted by the defendant and one Folkers, and would procure from said Folkers a conveyance to the defendant by deed and bill of sale, of all his, Folkers', interest in said business, and a release by him of all right he might have against the defendant for an accounting, he, the defendant, would pay to the plaintiff the sum of \$1,000; that pursuant to said agreement the plaintiff purchased the interest of Folkers for \$1,000, in said business, and afterward conveyed the same to the defendant, and also procured from Folkers the conveyance and release referred to; that the defendant in consideration thereof became liable to and promised to pay the plaintiff the sum of \$1,000, but that he had failed so to do, etc.

The over-crowded condition of the docket of this court forbids an extended rehearsal and discussion of the evidence. It will suffice to say that we have carefully read and considered the same, and are unable to say that the verdict is manifestly against the evidence.

We find no error in the rulings of the court upon the evidence or instructions. The letter from Folkers was properly excluded. It was but an *ex parte* unsworn statement of one not a party to the suit. *Winslow v. Newlan*, 45 Ill. 150. The court did not err in refusing plaintiff's first, second, third and fourth instructions. Where both parties to a cause are individuals, an instruction which singles out one of them and directs the jury with respect to judging of his

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credibility, is erroneous. Taylor v. Crowe, 122 Ill. App. 518; Matthews v. Granger, 196 Ill. 164; Helbig v. Ins. Co., 234 Ill. 251.

The judgment of the Circuit Court is affirmed.

Affirmed.

Lavada M. Pillo, Appellee, v. Francis M. Pillo, Appellant.

APPEALS AND ERRORS—*when finding of chancellor not disturbed.* Where the evidence is close and conflicting, and the Appellate Court cannot say that the finding of a chancellor was manifestly contrary to the evidence, such finding will not be disturbed.

Separate maintenance. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

ALBERT SALZENSTEIN, for appellant.

GRAHAM & GRAHAM, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from a decree for separate maintenance rendered upon a bill filed by appellee against appellant. The issue of fact as to whether or not appellee was living separate and apart from appellant, her husband, without her fault, was submitted to a jury and a verdict returned in the affirmative. The evidence is in close conflict and we cannot say that such finding, which was approved by the chancellor, was manifestly contrary to the evidence, nor that under the evidence as to appellant's financial status the amount allowed by the chancellor as alimony was grossly excessive.

The decree of the Circuit Court is affirmed.

Affirmed.

Samuel M. Thrift, Appellant, v. The Vandalia Railroad Company, Appellee.

1. *LICENSEES—when policemen and firemen are.* Where a police officer or a fireman enters upon premises in order that he may better perform his duties as such, but without any express or implied invitation of the owner of the premises, he is a mere licensee, and such owner owes him no duty except to refrain from inflicting wilful or wanton injury upon him. *Held*, that the particular ordinance in question in this case did not affect the general rule as above stated.

2. *NEGLIGENCE—what does not establish wilfulness.* Where the sole negligence charged is the violation of an ordinance, wilfulness is not established.

Action in case for personal injuries. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the May term, 1908. *Affirmed.* Opinion filed November 17, 1908.

WILLIAM E. NELSON and LEE BOLAND, for appellant;
DAVID HUTCHINSON, of counsel.

OUTTEN, ROBY, EWING and McCULLOUGH, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit against appellee for personal injuries received by appellant in the yards of the Illinois Central Railroad Company in the city of Decatur, through the alleged negligence of appellee. The yards in question were at the time used and operated by appellee under an arrangement with the Illinois Central Railroad Company. The declaration in its various counts alleges that upon a certain day between the hours of ten and eleven o'clock at night, at which time it was very dark and a violent snow storm was raging, appellant attempted to cross one of the tracks in said yard, in an endeavor to apprehend unknown persons who he had been informed were stealing property stored

in freight cars then upon the tracks in said yard, and that he was run over by a moving train which was running backward over such track without a light on the rear end thereof and without any warning being given by either whistle or bell, nor any brakeman or employe being stationed on the rear end of the train.

An ordinance of the city of Decatur then in force provided in substance that no railroad train should be started in the city without first ringing a bell or sounding a whistle thereon; that a bell should be kept constantly ringing while such train was in motion, and that any train running or backing in the night time should have a bright and conspicuous light on the end of the train which might be foremost in the direction in which the train was moving. The negligence upon which appellant relies primarily for recovery is the violation of such ordinance. It is charged in several of the counts that the train was recklessly backed in the night time when it was very dark, in disregard of the rights and safety of persons who might be upon said track; that the backing of the train was wanton and reckless, and that by reason of such gross and wanton negligence plaintiff was injured, etc. It is also averred in the sixth count that the defendant had been informed through its servants that the plaintiff would be upon the premises at or about the day of his injury for the purpose of apprehending offenders as aforesaid, and that said servants had assented thereto. The court sustained a general and special demurrer to the entire declaration and entered judgment for the defendant.

It is not contended by appellant that he was upon the premises by the invitation of the appellee, either express or implied; but it is insisted that he was rightfully there under a license given him by law. It is now well settled that where a police officer or fireman enters upon premises in order that he may better perform his duties as such, but without any express or implied invitation of the owner of the premises, he is

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a mere licensee, and such owner owes him no duty except to refrain from inflicting wilful or wanton injury upon him. The doctrine applies equally to cases where the license is given by law. *Gibson v. Leonard*, 143 Ill. 182; *Casey v. Adams*, 234 Ill. 350. Counsel contend however that the case at bar is distinguishable from those cited, in that the ordinance alleged to have been violated, being general in its nature, was enacted for the benefit of all persons rightfully upon the premises, and imposed upon appellee the duty to use reasonable care to avoid injuring such persons, whether they were expressly or impliedly invited there by appellee or not. We regard such position as untenable. The ordinance could only have been intended to protect those who might go upon the private right of way of appellee upon its business or by its solicitation or invitation or by its authority; that is to say, those whose presence there might be reasonably anticipated. An ordinance which could properly be construed to impose upon a railroad company the duty to anticipate the presence of persons, even peace officers in the performance of their official duties, upon its private right of way necessarily at rare intervals and at unexpected times and places, and to exercise continuous vigilance to avoid injuring them, would be manifestly unreasonable, and seriously interfere with the practical operation of railroads. Those operating them would thus be rendered unable to properly perform their duty to the public of furnishing cheap, safe and rapid transportation.

It is urged by counsel for appellant that inasmuch as it is averred in several counts of the declaration that appellee had knowledge, through certain of its servants, that appellant would go and be within its yards in the performance of his official duty, in the night time, on or about the day in question, it thus had specific notice of his presence there, and was bound to use reasonable care for his safety. The averment in question fails to state upon what particular

night, what time in the night, or at what place in the yard appellant expected to be; nor does it state which of the servants of appellee was so informed. It is therefore insufficient to establish the status of appellant as one upon the tracks with the knowledge and authority of appellee.

It is also insisted that even if it be conceded that appellant was a mere licensee, the characterization in several counts of the declaration of the alleged negligent acts of the defendant as wanton, wilful, reckless and heedless, established a right to recover under the rule above stated. The violation of the ordinance which is the sole negligence charged, did not constitute wantonness or wilfulness. *I. C. R. R. v. O'Connor*, 189 Ill. 557. It is not sufficiently pleaded that appellee had knowledge, express or implied, of the presence or probable presence of appellant upon the right of way. It therefore cannot be said that under the circumstances detailed in the declaration, such want of care and disregard for the rights of appellant existed as to constitute wilfulness or wantonness. It is manifest there could be no wilful disregard of the rights of one whose presence was unknown and could not have been reasonably anticipated.

The court did not err in its rulings upon the demurrer and the judgment will be affirmed.

Affirmed.

**Harry W. White, Appellee, v. Illinois Collieries Co.,
Appellant.**

INSTRUCTIONS—*erroneous to exclude issue of negligence.* The rule *res ipsa loquitur* not being invoked, it is error to authorize a jury in an action for personal injuries to render a verdict for the plaintiff without proof of negligence.

Action in case for personal injuries. Appeal from the Circuit

White v. Illinois Collieries Co., 145 App. 417.

Court of Montgomery county; the Hon. TRUMAN E. AMES, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

JETT & KINDER, for appellant.

L. V. HILL and HARRY C. STUTTLE, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellee, a minor, by his next friend, brought suit to recover damages for personal injuries received by him through the alleged negligence of appellant company while he was in its employ as a mule driver in its mines. Upon a trial by jury he recovered judgment for \$1,000, to reverse which this appeal is prosecuted. The declaration charges that plaintiff was a coal miner and was requested by defendant to act as a driver on the day he was injured; that he informed defendant he was not an experienced driver and had no knowledge whatever of driving; that defendant advised him it would furnish a gentle mule and that it was necessary for him to drive that day; that it was the duty of defendant to provide a reasonably safe, gentle and well-trained mule, and to inform plaintiff of any peculiar habits possessed by the mule he was provided with; that defendant negligently ordered and commanded plaintiff to use an unsafe mule, in that he was possessed of a peculiar habit of stopping at a certain low place in a certain entry, where the roof bulged downward and diminished the distance between the bottom and top; that plaintiff did not know of such habit of the mule and that defendant had known the same for a year; that while plaintiff was driving the mule, in the exercise of ordinary care, through said entry, and while he was riding on a car pulled by said mule, the animal came to said low place and suddenly stopped and refused to go further, whereby the car ran against the mule and plaintiff was

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thrown from the car and was caught between the car and the rib of coal, and injured.

As the judgment must be reversed for the reason hereinafter stated we shall not discuss the evidence at length or in detail. The third instruction given at the request of the plaintiff told the jury that if the plaintiff received the injuries charged in the declaration while in the exercise of ordinary care, and that the mule suddenly stopped when he came to the low place in the roof of the entry and that such sudden stopping was the cause of the plaintiff being injured, the verdict should be for the plaintiff. Such instruction which directs a verdict for the plaintiff without requiring any negligence on the part of the defendant to be shown, made the defendant an absolute insurer of the safety of the plaintiff, and is so obviously erroneous and prejudicial as to necessitate a reversal of the judgment. The cause will therefore be remanded for another trial.

Reversed and remanded.

Henry G. Metzger, Appellant, v. William B. Manlove, Appellee.

TRIAL—*when improper remarks will not reverse.* Improper remarks of counsel made in argument will not reverse where the verdict is clearly right.

Assumpsit. Appeal from the Circuit Court of Hancock county; the HON. ROBERT J. GRIER, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

CHARLES J. SCOFIELD and APOLLOS W. O'HARRA, for appellant.

J. N. CARTER, T. B. PAPE, VOSE & CREEL, J. W. WILLIAMS and S. P. LEMMON, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

A former judgment in this case in favor of the plaintiff was reversed by this court, for errors of the trial court, in admitting incompetent evidence in behalf of the plaintiff. In the opinion then filed (*Manlove v. Metzger*, 124 Ill. App. 383) the nature of the action and the pleadings are sufficiently stated. Upon a second trial, which resulted in a verdict and judgment for the defendant, there was additional evidence adduced by appellant which tended to show acts and conduct on the part of appellee which would have warranted the belief by the public that he was jointly interested with his son Joseph E. Manlove in the business in question.

In our former opinion, to which we now adhere, it was held that before a person can be held liable for the debt of another by reason of holding himself out as a partner when he is not a partner in fact, such holding out must be brought to the knowledge of the party extending the credit, at or before the time the credit is extended. The evidence in the present record fails to establish such knowledge on the part of appellant. While there is some evidence tending to show that appellee had knowingly permitted himself to be held out as such by his son, the same is clearly insufficient to warrant a finding that appellee had knowledge that he was being so advertised.

The instructions asked by appellant indicate that the liability of appellee was sought to be predicated upon the theory that an actual partnership existed between the parties. We are unable to say that the greater weight of the evidence upon the issue was so manifestly with appellant that the finding of the jury thereon should be disturbed.

Serious complaint is made of remarks made by one of counsel for appellant during the trial in the presence of the jury. Certain of the remarks in question were highly improper and would necessitate a reversal of

the judgment in a close case. In the present case, however, the verdict was so clearly in accordance with the evidence that we are satisfied that the rights of appellant were not prejudiced thereby.

It is further insisted that the court erred in the rulings upon the instructions. We have carefully considered the objections urged and are of opinion that the given instructions fully stated the law applicable with substantial accuracy, and that there was no error in this respect. The same may be said as to the rulings upon the admissibility of evidence offered.

The judgment of the Circuit Court is affirmed.

Affirmed.

**Scott Stollard, Appellant, v. William Nycum et al.,
Appellees.**

PARTITION—*when apportionment of solicitor's fees not warranted.* Even though the original petition properly set out the rights and interest of the parties, yet if by the death of one of such parties an amendment became necessary, which amendment did not set out every interest so fully and clearly that the parties defendant were relieved from the necessity of employing other counsel, an apportionment of complainant's solicitor's fees is properly denied.

Partition. Appeal from the Circuit Court of Logan county; the Hon. T. N. HARRIS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

BALDWIN & STRINGER, for appellant.

EDWARD G. KING, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a proceeding instituted by appellant for the partition of certain real estate, to which the other tenants in common were made defendants. The original

Stollard v. Nycum, 145 App. 421.

bill correctly stated the interests of the defendants. After it was filed, Mary Stollard, who held an estate for life in part of the land, and an undivided interest in fee simple in a portion of the remainder, died, leaving a will by which she devised her interest in fee to appellant. Thereupon appellant filed an amended bill setting up the death of Mary Stollard and his succession to her interest in fee in the premises. Appellee answered the amended bill setting up that appellant was at the time the original bill was filed, a tenant of Mary Stollard upon the greater portion of the lands sought to be partitioned, and had retained possession and used the same after her death until the filing of the cross bill; and that he thereby became liable to account to the defendants, his tenants in common, for such use and occupancy. Appellant thereupon filed an amendment to the amended bill setting up the facts averred in the answer and admitting his liability to account.

The cause was referred to the master to take proofs and report conclusions. There was some controversy upon the hearing, as to the rental value of the land so occupied by appellant, and the amount of his consequent liability to his co-tenants, the result of which was that the master recommended and the court decreed that he should account at the rate of \$5 per acre per annum for the period of nine months of his occupancy. A cross-bill was subsequently filed by defendants Fowler and McBride, setting up that Fowler had recovered a judgment against the estate of said Mary Stollard for \$700; that it would be necessary to subject her real estate to the payment of the same, and praying that the portion of the decree which found that appellant was entitled to the interest of Mary Stollard, be amended so as to find that such interest was subject to the payment of the debts of the said Mary Stollard. A decree was entered amending the original decree in accordance with the prayer of the cross-bill. After a sale of the property under said

decree and the approval of the same, appellant interposed a motion that the fees of his solicitor be apportioned among the parties as provided by the statute, which motion the court denied.

The statute provides that in proceedings for the partition of real estate, solicitor's fees shall be apportioned among the parties in interest where the rights and interests of the parties in the land are properly set forth in the bill and no good and substantial defense has been interposed. Rev. Stat. 1905, p. 1497. We are of opinion that the action of the court in refusing to apportion the complainant's solicitor's fees among the parties was warranted. While the original bill set up the interests of the parties correctly at the time it was filed, the death of Mary Stollard made it necessary to amend the same. It then became the duty of appellant to set out fully and accurately the interests of all the parties as they then existed. This he failed to do, and it became necessary for the defendants to employ counsel to properly protect their interests as was done by the cross-bill. The statute does not contemplate the apportionment of costs in any case where the bill does not set out every interest so fully and fairly that the parties defendant are relieved from the necessity of employing other counsel. The petition or bill should be so accurate in this respect that all the parties can safely allow a default to go against them.

The decree of the Circuit Court should be and is affirmed.

Affirmed.

Leeper v. Rogers Grain Co., 145 App. 424.

Charles O. Leeper, Appellee, v. Rogers Grain Co., Appellant.

INSTRUCTIONS—*must not ignore material issue.* An instruction which authorizes a verdict in disregard of how a particular issue may be determined, is erroneous and cannot be cured by other instructions given.

Trover. Appeal from the Circuit Court of De Witt county; the Hon. W. G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

HERRICK & HERRICK, for appellant.

INGHAM & INGHAM, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in trover by Leeper against Rogers Grain Co., a corporation, for the recovery of the value of certain corn. The plaintiff recovered a judgment for \$220.45, to reverse which the defendant appeals. The declaration charges that Leeper, the plaintiff, owned a farm, which he rented to one Huffman for the year beginning March 1, 1906; that the defendant corporation bought and paid for the corn raised by Huffman upon the premises during that year; that Huffman had not paid the full amount of rent due, by reason of which the defendant became liable to the plaintiff therefor. The evidence establishes the averments of the declaration, and that the amount for which judgment was rendered was still due Leeper at the time suit was brought. There is also evidence tending to show that appellee consented to or acquiesced in the payment by appellant to the tenant of the proceeds of the corn raised on the farm, in which case he must be held to have waived his lien. This question, which is decisive of the case, was one of fact for a jury. Several of the instructions given at the re-

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quest of appellee directed a verdict without regard to the issue whether the lien had been waived or not. This was palpable error, which was not cured by the other instructions given. The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

**George W. Reed et al., Appellants, v. John Ziemans,
Appellee.**

1. **BROKERS AND FACTORS**—*when real estate commissions cannot be recovered.* If the broker has been guilty of bad faith to his principal in connection with the consummation of the sale for which he claims commissions, no recovery can be had.

2. **VERDICT**—*how incapacity of juror may not be established.* The mental incapacity of a juror is not ground for reversal unless established by affidavits of persons competent to testify to such mental incapacity.

Assumpsit. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in th's court at the May term, 1908. Affirmed. Opinion filed November 17, 1908. Rehearing denied December 17, 1908.

CHARLES M. PEIRCE and W. W. WHITMORE, for appellants.

CHARLES I. WILL and BARRY & MORRISSEY, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in *assumpsit* by the firm of Reed & Welch, real estate agents, against John Ziemans and Frank McKennan, to recover commissions alleged to be due them under a written contract for services rendered in procuring the exchange of certain of their real estate for other property belonging to one Mickelberry. Judgment was rendered in the Circuit Court

for the defendants and the plaintiffs appeal. By the first count of their declaration they seek to recover upon a *quantum meruit*, and by the second an alleged stipulated commission of \$960, being one dollar per acre. McKennan was defaulted and Ziemans pleaded the general issue.

The evidence discloses that Ziemans and McKennan each owned an undivided one-half interest in certain lands in Iroquois county, Illinois; that the property in question was encumbered to the extent of \$21,000; that McKennan owed \$6,050 to other parties for which Ziemans was security; that they owed jointly \$3,811.35; that on June 15, 1905, they entered into a written agreement which recited the existence and character of the aforesaid indebtedness and then provided that McKennan should convey the land to Ziemans; that \$1,000 should be borrowed by them to be secured by a trust deed upon the land to one Welty; that out of the proceeds of such loan Welty should pay the joint indebtedness of the parties and apply the balance on the indebtedness of McKennan for which Ziemans was security; that the property should be sold as soon as consistent with the best interests of the parties, and out of the proceeds each of them should be repaid any advances made by them, and the balance, if any, should be divided between them, McKennan agreeing to protect Ziemans against any deficit. One Mickelberry owned a building and stock of goods at Clinton, Illinois, which he had listed with appellants for sale or exchange. Through the efforts of appellants negotiations were begun between McKennan and Mickelberry for the exchange of the Iroquois county farm for said Clinton property, which finally terminated, on May 9, 1906, in a written contract between Mickelberry, Ziemans and McKennan for the exchange of the property. Said contract provided that all deeds and papers necessary for the proper transfer of the property should be executed and delivered to a bank in Bloomington, to be held in escrow and delivered to

the respective parties in interest as soon as the provisions of the contract were complied with. It also provided that the personal property should be conveyed by bill of sale to a trustee for McKennan's use, as provided in a certain contract to be entered into between McKennan and Ziemans, and which was to be of even date therewith. Ziemans and McKennan were unable to agree upon the terms of said latter proposed contract, and the same was never executed. Appellee thereupon refused to abide by the contract of exchange and the same was never consummated. McKennan then filed a bill for specific performance against appellee and Mickelberry and appellant instituted the present action.

The evidence tends to show that appellants were employed by McKennan and rendered the services for which they seek to recover and that they were the procuring cause of the contract between Ziemans, McKennan and Mickelberry; but appellee contends, and so testified, that he neither employed, nor agreed to pay appellants a commission for their services.

It is not controverted that during the time negotiations for an exchange of the two properties were pending appellants entered into an arrangement with Mickelberry whereby Mickelberry agreed to pay to them a commission of \$500 in the event that the proposed deal was consummated. There is evidence tending to show that appellants also agreed with McKennan to divide with him such commissions as they might receive in the transaction, and further that Ziemans was not a party to or cognizant of either of such agreements for the payment and division of commissions. While it is true that the evidence upon that issue was in close conflict, if the jury gave credence to the testimony of Ziemans they were warranted in finding that the latter agreement was in fact made and that Ziemans had no knowledge of either of such agreements and did not consent thereto.

It follows that as appellants were in the employ of

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both Mickelberry and Ziemans without the knowledge or consent of Ziemans they were guilty of bad faith toward the latter and cannot recover commissions from him. *Bunn v. Keach*, 214 Ill. 259.

It is contended by counsel for appellants that the effect of the contract between McKennan and Ziemans was to constitute them partners in the ownership of the farm and that Ziemans was therefore bound by the acts of McKennan in the premises.

The obvious purpose of Ziemans in entering into the contract was to procure a settlement with McKennan to obtain security for the money he had advanced as well as that for which he was liable on surety for him, and to facilitate the sale and conveyance of the property. It was in no sense a joint venture or enterprise within the meaning of the law governing partnerships and the rule invoked is therefore inapplicable.

We have carefully considered the objections urged to the rulings of the court upon the instructions, and are satisfied that the same are not prejudicial to appellants. It is insisted that a new trial should have been granted for the reason that it developed after the trial that a member of the jury was mentally incompetent to sit as such. It will suffice to say that such fact does not satisfactorily appear from affidavits of those whose evidence would be competent upon the question. The merits of the case appear to be clearly with appellee, and inasmuch as no error harmful to the appellants was committed upon the trial the judgment will be affirmed.

Affirmed.

Hornung v. Decatur Railway and Light Co., 145 App. 429.

F. K. Hornung, Appellee, v. Decatur Railway and Light Co., Appellant.

1. VERDICT—*when not disturbed as against the evidence.* A verdict will not be set aside upon review as against the preponderance of the evidence unless clearly and manifestly so.

2. CONTRIBUTORY NEGLIGENCE—*how question to be determined.* Whether a plaintiff has been guilty of contributory negligence which resulted in his injury, is a question of fact, where the evidence is conflicting, to be determined by the jury.

3. INSTRUCTIONS—*when upon assessment of damages, will not be reviewed.* In the absence of a claim that the verdict is excessive, assignments of error respecting the propriety of instructions given upon the question of damages will not be considered.

Action in case for personal injuries. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

HUGH CREA and HUGH W. HOUSUM, for appellant.

A. G. WEBBER, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from a judgment recovered by appellee against appellant for the sum of \$1,500 as damages for personal injuries alleged to have been sustained by reason of the negligence of appellant. The first count of the declaration charges that appellee was driving a horse hitched to a wagon, upon and along North Water street, in the city of Decatur; that when he reached a certain place on said street it became necessary for him to drive across the tracks of appellant's street car line; that while he was so doing, one of the appellant's cars, which was being run at a high and dangerous rate of speed, ran into his wagon and injured him. The second count charges the failure of the motorman to reduce the speed of the car.

The evidence tends to establish the material allega-

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tions of the declaration. The motorman in charge of the car testified that when he noticed appellee he was about 100 feet distant; that the car at the time was running at the rate of thirty miles an hour, and that he saw that appellee was in danger and rang the bell. There is evidence tending to show that after the car had struck appellee it ran from thirty to ninety feet further before stopping. The motorman also testified that at the rate the car was running it could have been stopped within sixty feet, and the conductor testified that it could have been stopped within forty or fifty feet. While the evidence is somewhat in conflict, we are unable to say that the jury were not warranted in finding both that the car was being run at a dangerous rate of speed under the circumstances and that the motorman failed to properly bring the car under control when he noticed that appellee was attempting to cross the track.

It is urged that appellee was guilty of contributory negligence. He testified that at the time he attempted to cross the tracks the wind was blowing hard, and that he did not hear the car approaching; that he looked toward the north for the distance of a block, and seeing nothing, started to drive across the track. The question as to what constituted due care on the part of appellee under the circumstances, was peculiarly one of fact for the jury. Inasmuch as its findings upon the issue was not manifestly contrary to the evidence, we are not disposed to disturb the same.

It is not urged that the verdict is excessive. It is therefore unnecessary to consider the alleged error in the instructions relative to the assessment of damages. We find no prejudicial error in the rulings of the court on the instructions or the evidence.

The judgment of the Circuit Court is affirmed.

Affirmed.

**James R. Miller, Appellant, v. C., C., C. & St. L. Ry. Co.,
Appellee.**

1. CONTRIBUTORY NEGLIGENCE—*how question to be determined.* Whether a plaintiff has been guilty of contributory negligence which resulted in his injury, is a question of fact, where the evidence is conflicting, to be determined by the jury.

2. INSTRUCTIONS—*must be predicated upon the evidence.* An instruction which is unsupported upon any hypothesis of evidence should not be given.

Action in case for personal injuries. Appeal from the Circuit Court of Shelby county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in the court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

CHAFEE & CHEW, for appellant.

GEORGE B. GILLESPIE, for appellee; L. J. HACKNEY, HAMLIN, GILLESPIE & FITZGERALD and W. C. KELLY, of counsel.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

In an action by appellant against appellee for the recovery of damages for personal injuries alleged to have been sustained by him through the negligence of appellee, while he was a passenger upon one of its trains, judgment was rendered upon the verdict of a jury, in favor of the defendant and in bar of the action. The negligence charged in the first count of the declaration is that after the train upon which the plaintiff was a passenger had reached the station of Shelbyville and had stopped, he went upon the platform of the coach in which he had been riding intending to alight, and that just as he had reached the platform, the defendant caused the train to be suddenly and violently moved forward, and that the plaintiff in attempting to avoid falling had his fingers caught by the closing of the door of said coach, whereby they

were cut and injured. It is further charged in the second count that the defendant negligently caused the door of the coach in question to be opened and in no wise securely fastened. Appellant testified that he received the injury for which he seeks to recover under the following circumstances: "When we reached Shelbyville the conductor and brakeman both went through the train. The brakeman called the station, opened the door, went out, and then closed it. After that the train came to a standstill, and I got up and with my grip in my right hand opened the door with my left hand and stepped out on the platform. Just as I did so the coach made a lurch forward for some cause. There was no one on the platform beside myself. There was nothing said about the train starting. I grabbed for something to keep me from falling and caught the door and it came onto these two fingers and I had to set my valise down and push the door off of them. At the time I set my valise down my fingers were between the door and the facing. I would have fallen to the floor had I not caught the door. My recollection is that I took hold of the door and swung it back and then stepped out. The door swung back on the inside of the car and I was outside of the door standing right even with it. When the car moved it threw me off my feet. I might possibly have staggered against the door. The door did not lock. My fingers were caught on the opposite side from the hinges. The train was going east and the door opened back to the north."

The main contested question in the case was whether or not appellant at the time he received the injury, was in the exercise of due care under all the surrounding circumstances. This was a question of fact exclusively for the determination of the jury, and had they been accurately advised as to the law, we would not be disposed to disturb their finding. The court instructed the jury at the request of the appellee, that although they believed from the evidence "that the plaintiff was

injured, while alighting or attempting to alight from a passenger train of the defendant company, and that the company was guilty of negligence in causing his injury, yet that fact alone would not entitle him to recover;" and if they believed from the evidence "that at the time he was injured he was attempting to alight from a moving train, or from a train before it had arrived at the platform, or before said train had arrived at the usual place of discharging passengers," it was proper for them to take into consideration such facts in connection with the other circumstances surrounding the plaintiff, at the time, in determining whether he was in the exercise of due care for his own safety; and that if they determined "that at the time he was injured the plaintiff was not in the exercise of due care and caution for his own safety but voluntarily put himself in a place of danger or knowingly attempted to alight from the train while it was moving, or at a time when he knew it was about to be moved, and that in so doing he did not exercise under the circumstances reasonable care and caution for his own safety," then they should find the defendant not guilty.

The court erred in giving the foregoing instruction for the reason that it was not based upon the evidence. There was no evidence tending to show that appellant was attempting to alight from a moving train at the time he received his injury. The word "alight" in its ordinary acceptation means to get down from or descend. The evidence shows that appellant had when injured but arrived at the platform preparatory to alighting. We are not satisfied that the jury were not misled to the prejudice of appellant. The judgment of the Circuit Court will therefore be reversed and the cause remanded.

Reversed and remanded.

Davis B. Folrath, Appellee, v. Walter Hutchin, Appellant.

1. STATUTE OF FRAUDS—*who may avail of*. A lessee entitled to possession of demised premises may urge as against a former tenant in possession that such possession was under an agreement void by virtue of the statute of frauds.

2. LANDLORD AND TENANT—*when demand for possession not essential*. Demand for possession is not essential where the tenant is in possession without right.

Forcible detainer. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

C. E. SCHROLL, for appellant.

BUCKINGHAM & GRAY, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal by Hutchins, the appellant, from a judgment rendered against him in a forcible entry and detainer proceeding instituted by Folrath, the appellee. The material facts are the following: Hutchins and his partner, one Hardy, had leased from Carter, the owner, the premises in controversy, for the period of five years from March 1, 1902. It appears from the testimony of Hutchins and Hardy, that during July, 1905, they had a conversation with Carter relative to a renewal of the lease at its expiration, and that Carter then agreed orally to execute to them a written lease for the premises, upon the expiration of the one they then held, at a rental of \$1,600 per annum, payable monthly, and for a period of either five or ten years at their option. Hutchins further testified that upon the following rent day Carter informed him that he had decided not to rent to them again. In August, 1903, Carter leased the premises to

Folrath for the term of ten years from March 1, 1907, at \$1,600 per annum. On March 1, 1907, Hutchins, to whom Hardy had assigned his interest, tendered to Carter one month's rent at the rate of \$1,600 per annum. Carter refused to accept the same and on March 4th, made a demand in writing for possession of the premises, and upon refusal to surrender them, brought the present suit.

Appellant concedes that the alleged parol agreement for a new lease, for a longer period than one year, was voidable under the Statute of Frauds, but insists that as Folrath was not privy to the contract he was not in a position to take advantage of the statute. Such position is untenable. (Best v. Davis, 44 Ill. App. 624). In reply to appellant's further contention that inasmuch as he was rightfully in possession under an oral agreement for a lease, the only way in which such occupancy could be terminated was by thirty days' notice in writing, it will suffice to say that appellant's own testimony shows that such agreement, if made, was rescinded by Carter before it was acted upon by appellant and Hardy. He was therefore not in possession under an existing and binding agreement at the time demand for possession was made.

In this view of the case the error in giving appellee's second instruction was harmless. The judgment will be affirmed.

Affirmed.

William D. Null et al., Appellees, v. Thomas Parsons et al., Appellants.

1. **CORPORATIONS**—*when principles of partnership applied to.* If a corporation closely partakes of the nature of a partnership it will be governed by the rules and principles applied to partnerships.

2. **CORPORATION**—*when dissolution of will be decreed.* A corporation will be dissolved if it so closely partakes of the nature of a partnership as to be governed by the rules and principles of partnerships and it is shown that ill-will and dissension has arisen between the members forming the joint enterprise.

3. **EQUITY**—*when remedy at law does not oust jurisdiction.* Under the law of partnerships, the existence of a remedy at law will not preclude the interposition of equity to grant the relief of dissolution.

4. **DECREE**—*when cannot be attacked for insufficiency of prayer for relief.* A decree entered *pro confesso* cannot be questioned on review upon the ground that it was not authorized by the relief prayed.

Bill in chancery. Appeal from the Circuit Court of Hancock county; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

S. L. McCROBY and WILLIAM H. HARTZELL, for appellants.

CHARLES J. SCOFIELD and JOHN W. WILLIAMS, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a bill in chancery by appellees against appellants, charging that appellees and appellants, all of whom lived in the vicinity of Burnside, in the latter part of the year 1900, organized a company for mutual convenience in securing telephone service by a system of telephones; that they entered into a written agreement, which provided among other things that each member should share equally in the expense

of construction, maintenance or extension of the line and should have equal privileges in its benefits; that such organization should be known as the Shake Rag Telephone Company; that pursuant to said agreement they expended about \$600 in installing the system; that prior to January 1, 1907, they had contracts with divers switchboard companies located at Burnside, Illinois, for the exchange of telephone service; that in July, 1906, permission was granted to all who desired to do so, to connect with the Burnside Telephone Exchange, and pursuant thereto appellees contracted with such exchanges and their respective telephones were connected therewith; that about February 1, 1907, appellants connected the line of said Shake Rag Telephone Company with the switchboard of Manning & Steel at Burnside, Illinois, thus making two connections; that such connections had caused confusion and interruption in the use of the Shake Rag Telephone Company's line, had greatly injured its efficiency and rendered the same wholly without a value for telephone purposes; that at the meeting of the members of said Shake Rag Telephone Company on March 1, 1907, a resolution was adopted providing that all members of the company who then had connection by the wires and poles of the company with the Burnside telephone exchange, should sever such connection within two days, and that in default thereof such connection might be severed by the board of managers of the company, or that a meeting might be called for the purpose of expelling such member, or other proceedings be taken to enforce obedience of the rule; that the board of managers thereafter severed the wire of said company which connected with the Manning & Steel Switch, and that appellants again connected the same, thereby inflicting an irreparable injury to the use of property; that ill-will and dissension had arisen between appellants and appellees and their relations had become so strained that they could no longer work in harmony, and said telephone line had

become out of repair and its use entirely destroyed; that they own no other property in common and that a dissolution of said company and a sale of its property and division of the proceeds was necessary in order to preserve the rights of all.

The bill prays that the court ascertain and declare the rights and interests of all the parties to the suit; that a dissolution of said company be decreed; that its property be partitioned among the several parties entitled thereto, if practicable, and if not practicable that the same be sold and the proceeds divided among the parties in interest; and that if necessary a receiver be appointed to wind up the affairs of the company; to which is added the prayer for general relief. A general and special demurrer interposed by appellants to the bill was overruled. They abided by their demurrer, whereupon a decree was entered dissolving the co-partnership and ordering the master in chancery to make sale of the assets.

We are of opinion that the facts set forth in the bill are sufficient to entitle the complainants to equitable relief and that the chancellor properly so held. It is manifest that the Shake Rag Telephone Company was a joint enterprise and so closely partook of the nature of a partnership as to be governed by the rules and principles of partnerships. Being a partnership at will, it could be terminated at any time. *Metcalf v. Bradshaw*, 145 Ill. 124.

The bill avers that ill-will and dissension had arisen between the members so that they could no longer work together in harmony. In such case a court of equity will dissolve a partnership. *Whalen v. Stephens*, 193 Ill. 121. This is not a proceeding for partition of either real or personal estate, as contended by appellants. It is in effect but a bill for the dissolution of a partnership. If any of the partnership property is real estate, for the purposes of the partnership the same will be in equity considered as personal property. The only interest of the members in the part-

McDonald v. B. & O. S. W. R. R. Co., 145 App. 439.

nership property, whether real or personal, is their proportionate share of the residue upon a final settlement of the partnership business. *Simpson v. Leech*, 86 Ill. 286; *Galbraith v. Tracy*, 153 Ill. 54; *Van Housen v. Copeland*, 180 Ill. 74.

That appellees had not a full and complete remedy at law under section 8 of the by-laws, which provides for the expulsion of any member for a refusal to obey the rules, is too obvious to warrant discussion; but if it were otherwise, such remedy at law would not preclude a suit in equity of the present character. 2 *Bates Partnership*, sec. 907; 2 *Lindley Partnership*, p. 486. It is unnecessary to consider the contention that the specific prayer for relief is insufficient to warrant the decree rendered, or that the decree fails to declare the rights of the respective parties. Appellants by abiding by their demurrer, failing to answer, and permitting a default *pro confesso* to go against them, cannot now question the decree. It appears upon the face of the bill that all members of the partnership are made either parties complainant or defendant. There is therefore no want of proper parties, as is contended by appellants.

The decree of the Circuit Court will be affirmed.

Affirmed.

Henry McDonald, Admr., Appellee, v. B. & O. S. W. R. R. Co., Appellant.

NEGLIGENCE—*duty of railroad company to warn pedestrians of intended movement of cars.* If a railroad company leaves a string of cars standing within a few feet of a public thoroughfare over which pedestrians might reasonably be expected to pass at any time, it is the duty of such company's servants, in the exercise of ordinary care, in some manner to give timely warning to passers-by of the impending movement of such cars.

McDonald v. B. & O. S. W. R. R. Co., 145 App. 439.

Action in case. Appeal from the Circuit Court of Cass county; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

GRAHAM & GRAHAM for appellant; EDWARD BARTON, of counsel.

A. A. LEEPER, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case by appellee against appellant, to recover damages for causing the death of appellee's intestate, which it is charged was the result of the negligence of appellant. A trial by jury resulted in a verdict and judgment in favor of the plaintiff for \$750. The deceased was struck and killed by a car upon appellant's track at a point where the same crossed the public sidewalk upon which he was walking, such car having been set in motion by the impact of a locomotive and string of cars which were being backed over the track which led over the sidewalk. The negligence charged in the declaration is that the car which struck the deceased was within six feet of the sidewalk, with the brake thereon unset, and that appellant negligently ran its locomotive and string of cars against said car, forcing the same against the deceased, thereby causing his death; and further that no servant of appellant was stationed at the crossing to warn persons who might be passing over the same.

The evidence discloses that the appellant's tracks and its yards at Beardstown, near the passenger depot, run in a general north and south direction; that all of such tracks terminate on the south side of Fourth street near the passenger depot, except the "city" track, which runs across Fourth street, at right angles, to some local industries. Immediately prior to the accident, a string consisting of six freight cars, was standing on the "city" track in front of the station

and but a few feet from the south line of Fourth street. The deceased had walked north along the station platform until he reached the sidewalk on the south side of Fourth street, when he started west across the "city" track, and was run over by the string of cars in question, which had been set in motion by the impact of three other cars which were being pushed by a switch engine over the "city" track from the south.

The evidence tends to show that the brakes upon the latter cars were at the time unset; and further, that a brakeman who was stationed on the north side of Fourth street, endeavored by shouting to the deceased to warn him of his danger prior to stepping upon the track. We are of opinion that in view of the fact that the string of cars were left standing within a few feet of the public thoroughfare over which pedestrians might reasonably be expected to pass at any time, it was the duty of appellant's servants, in the exercise of ordinary care, in some manner to give timely warning to passersby of the impending movement of such cars. Whether the presence of a brakeman on the opposite side of the street was a sufficient compliance with such duty was a question for the jury, as were the further issues as to whether the negligence shown was the proximate cause of the death of plaintiff's intestate, and whether he was, immediately prior to and at the time he was killed, in the exercise of ordinary care for his own safety. Inasmuch as the conclusion of the jury thereupon was not clearly contrary to the evidence, we are not at liberty to disturb the same.

The judgment of the Circuit Court is accordingly affirmed.

Affirmed.

Bingaman v. Toledo, St. Louis & Western R. R. Co., 145 App. 442.

Robert M. Bingaman, Appellee, v. Toledo, St. Louis & Western R. R. Co., Appellant.

APPEALS AND ERRORS—*when judgment will be affirmed.* If no prejudicial error appears and the verdict is sustained by the evidence, a judgment will be affirmed.

Trespass on the case. Appeal from the Circuit Court of Coles county; the Hon. JAMES W. CRAIG, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

C. E. POPE, for appellant; CLARENCE BROWN and CHARLES M. SCHMETTAU, of counsel.

BRYAN H. TIVNEN, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case by appellee against appellant to recover damages for the loss of certain buildings and personal property alleged to have been destroyed by fire communicated by a locomotive engine operated by appellant upon its railroad. The trial resulted in a judgment in favor of appellee for \$250. The negligence charged in the first count of the declaration is that the defendant failed to keep its right of way free from grass and other combustibles whereby sparks escaped from one of its locomotives, ignited said combustibles and caused fire to spread to and upon the land of the plaintiff and destroy certain buildings, trees and chattel property of the plaintiff.

The negligence charged in the second count is that the defendant failed to equip a certain one of its locomotives with the best and most approved appliances to prevent the escape of fire, and to keep the same in suitable repair, whereby fire escaped therefrom and burned and destroyed the plaintiff's said property. Appellant admits in its statements of facts the destruction of the property by fire and that fire was dis-

covered in the barn of appellee immediately after a freight train upon the railroad had passed the vicinity of the premises. There was no evidence tending to show that the fire originated from any other source, and the jury was warranted in finding from all the surrounding facts and circumstances, that it was communicated as charged in the declaration. In this state of the proof, the question whether the court erred in refusing to instruct the jury to disregard the first count of the declaration becomes unimportant. For the same reason the error in appellee's sixth instruction, even if not cured by appellant's eighth, which correctly stated the law, was not harmful.

We find no prejudicial error in the rulings of the court upon the other instructions or the admission of evidence.

The motion to tax costs of additional abstract to appellant is denied.

The judgment of the Circuit Court is affirmed.

Affirmed.

V. W. Johnston, Defendant in Error, v. A. M. Loar, Plaintiff in Error.

1. PLEADING—*effect of verified plea of non est factum.* The interposition of a verified plea of *non est factum* imposes upon the plaintiff the burden of proving the execution of the notes and the endorsement, assignments and respective deliveries of the notes, as averred in the declaration.

2. NEGOTIABLE INSTRUMENTS—*presumption as to time of assignment.* In the absence of proof as to the time of assignment of a note, it would be presumed that it was made before maturity.

3. NEGOTIABLE INSTRUMENTS—*when fraud in inducing execution competent as against assignee.* If an assignee, at the time of the assignment to it of the notes in suit, was manifestly not a *bona fide* purchaser and holder thereof, fraud which induced the execution of such notes may be shown by way of defense to an action brought by such an assignee.

Assumpsit. Error to the Circuit Court of Moultrie county; the Hon. W. G. COCHRAN, Judge, presiding. Heard in this court at

Johnston v. Loar, 145 App. 443.

the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

W. K. WHITFIELD and JAMES L. LOAR, for plaintiff in error.

E. J. MILLER, for defendant in error.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in assumpsit by defendant in error against plaintiff in error for the recovery of the amount alleged to be due upon two judgment notes for the sum of \$500 each, signed by plaintiff in error, due in six and nine months respectively, and payable to the order of William R. White. Upon the back of each note appears the following endorsement: "Pay to the order of V. W. Johnson without recourse. William R. White." The declaration alleges that on August 18, 1903, the day the notes bear date, they were assigned and delivered by White, the payee, to the German-American Bank of Bloomington, Ill., and that said bank afterward sold and delivered the same to the plaintiff. The defendant interposed a verified plea denying the transfer and delivery of the notes by White to the bank, or by the bank to the plaintiff, or that they were purchased by the bank in good faith for a valuable consideration before maturity, or at any other time; also special pleas alleging in substance that the notes were purchased by the bank and the plaintiff long after their maturity and were procured to be executed and delivered by the defendant to White pursuant to and in furtherance of an unlawful scheme similar to that described and detailed in *White v. Moran*, 134 Ill. App. 480; and that there was no other consideration for the notes, of which fact the bank and plaintiff had notice at the time they acquired the same.

Issues were joined upon said pleas. Upon the trial, at the close of all the evidence, the court directed a verdict for the plaintiff. Judgment was rendered thereon for \$1250.82 being the amount due upon the notes. To

reverse such judgment this writ of error is prosecuted by the defendant.

The interposition of the verified plea of *non est factum* imposed upon the plaintiff the burden of proving the execution of the notes and the endorsement, assignments and respective deliveries of the notes, as averred in the declaration. *Walsh v. Marvel*, 130 Ill. App. 305. The evidence offered by the plaintiff upon these issues, while meager and somewhat unsatisfactory was sufficient, we think, in the absence of contradictory evidence, to warrant the admission of the notes in evidence.

In the absence of proof as to the time of the assignment of a note it will be presumed that it was made before maturity. *Cook v. Norwood*, 106 Ill. 558. No evidence was offered by the defendant upon this issue, while the plaintiff offered evidence tending to show that the assignment of the notes was made before maturity.

The defendant on the trial sought to introduce evidence which tended to show the fraudulent and void character of the notes, and that the bank through its cashier had notice of the fraudulent and void character of the notes at the time it purchased them, but the court held such evidence incompetent. This was error. We have heretofore held, in *White v. Moran*, *supra*, that a promissory note executed and delivered under the circumstances and for the purposes alleged in the pleas, is without legal consideration and void as between the original parties. If the bank at the time the notes in suit were transferred to it had notice of such facts, it was manifestly not a *bona fide* holder of the same, and took them subject to all defenses, notwithstanding it may have acquired them for a valuable consideration before maturity and in the regular course of business.

Other questions are presented and argued which it is at this time unnecessary to consider or determine. The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

The People of the State of Illinois, ex rel. Viola Slusser, Defendant in Error, v. Bertha Johnson, Plaintiff in Error.

1. **APPEALS AND ERRORS**—*what court has jurisdiction of appeal appointing guardian.* An appeal lies from the County to the Circuit Court from an order appointing a guardian for a minor child.

2. **GUARDIAN AND WARD**—*character of proceedings for appointment.* Application for the appointment of a guardian for a minor child is in no proper sense a suit or proceeding at law or in chancery within the meaning of section 8 of the Appellate Court Act, but such a proceeding is purely statutory.

Petition for appointment of guardian. Error to the County Court of Vermillion county; the Hon. ISAAC A. LOVE, Judge, presiding. Heard in this court at the May term, 1908. Writ of error dismissed. Opinion filed November 17, 1908.

GEORGE B. LEONARD, for plaintiff in error.

KEESLAR & GUN, for defendant in error.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

On July 3, 1907, Viola Slusser filed a petition in the County Court for the appointment of a guardian of the person of Genevieve Jenkins, a minor child of the plaintiff in error, averring in said petition that the father had deserted said child and the mother was addicted to the excessive use of intoxicating liquor. On the same day the court issued a citation directing the plaintiff in error to appear on July 6, 1907, and show cause why the prayer of the petition should not be granted. The citation was served upon the plaintiff in error by the sheriff, and she appeared in court and resisted said petition. The court after hearing the evidence held that the plaintiff in error was not a proper person to have the custody of said child, and appointed Viola Slusser the guardian of said child. To review said order a writ of error was sued out of this court.

Although the question is not urged by counsel, we

are of opinion that the writ of error should be dismissed on the ground of lack of jurisdiction in this court to issue the same. Section 43 of the act entitled "Guardian and Ward" (Rev. Stat. p. 1174) provides that appeals shall be allowed to the Circuit Court from any order or judgment made or rendered under this act, upon the appellant giving bond, etc. *McCallum v. Trust Co.*, 203 Ill. 142, cited by counsel for plaintiff in error, was a writ of error sued out from the Supreme Court, from the Probate Court of Cook county, to review the order of that court disapproving a guardian's report of sale of real estate and ordering a re-sale of the property. The court held that the foregoing section was repealed by implication by the adoption of section 88 of the Practice Act and section 8 of the Appellate Court Act, and that the writ of error was properly sued out from that court. We do not think that it was there intended to be held that writs of error or appeals to review other orders in guardianship matters than those pertaining to applications to sell real estate, should issue from or lie to the Appellate or Supreme Courts. This view is borne out by section 11 of the Probate Court Act (Rev. Stat. 1905, p. 628), which provides that "appeals may be taken from the final orders, judgments and decrees of the Probate Courts to the Circuit Courts of their respective counties in all matters except in proceedings on the application of executors, administrators, guardians and conservators for the sale of real estate, upon the appellant giving bond," etc.

It is obvious that proceedings for the appointment of guardians are in no proper sense suits or proceedings at law or in chancery within the meaning of section 8 of the Appellate Court Act, but that they are purely statutory. *Grier v. Cable*, 159 Ill. 29. This court therefore has no jurisdiction to issue writs of error to review orders, judgments or decrees of the County or Probate Courts in guardianship matters, except those involving applications to sell real estate and

Still v. McGuire-Cummings Manufacturing Co., 145 App. 448.

where a freehold is not involved. *Lynn v. Lynn*, 160 Ill. 317. The proper remedy in proceedings of the present character, is through an appeal to the Circuit Court. The writ of error is therefore dismissed.

Writ of error dismissed.

Lettie Still, Administratrix, Appellee, v. McGuire-Cummings Manufacturing Co., Appellant.

INSTRUCTIONS—*must be confined to issues.* Instructions which are not confined to the issues of a cause should not be given.

Action in case. Appeal from the Circuit Court of Edgar county; the Hon. JAMES W. CRAIG, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

H. S. TANNER and J. E. DYAS, for appellant.

JOHN W. SHEPHERD and FRANK T. O'HAIR, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case by Lettie Still, administratrix of the estate of William Still, deceased, against the McGuire-Cummings Manufacturing Co., for the recovery of damages for wrongfully causing the death of her intestate, which it is charged was occasioned by the negligence of the defendant company. The jury returned a verdict for plaintiff and assessed the damages at \$4,000. To reverse the judgment rendered thereupon this appeal is prosecuted by the defendant.

The first count of the declaration alleges in substance that the defendant, a corporation, was engaged in the construction of railroad and other cars; that on the day he was killed Still was in its employ and with other

servants was engaged in assembling the various parts of cars, under the direction of a foreman; that he was directed by said foreman to assist in lifting and unloading a heavy iron car frame from a flat car; that he and other servants were directed to and did place an iron chain, furnished by the defendant, and which was attached to a derrick, around said car frame, so that such frame could be lifted from the flat car, and placed in proper position to be used; that the defendant negligently failed to furnish a chain of the proper strength and size for the use aforesaid, but furnished one of insufficient size, quality and strength to bear the weight of and lift said car frame; by reason whereof, while Still was engaged in assisting in lifting and removing said car frame by means of said derrick and chain, such chain, because of its insufficiency, defective condition and lack of strength, proper size and quality, then and there broke and permitted said car frame to fall upon him, thereby causing his death.

The negligence charged in the second count is that the defendant failed to furnish a sufficient chain or chains and fall lines and guy ropes, of proper and sufficient strength, size and quality to enable Still and the servants employed with him, to safely move and handle said car frame, and that the foreman, who was not a fellow-servant of Still, negligently failed to properly direct the use of said apparatus in a safe and proper manner.

As the cause may again be tried, we shall not discuss the evidence, other than to say that there was evidence adduced which fairly tended to support the declaration.

At the request of the plaintiff the court gave to the jury the following instruction:

“The court instructs the jury that a master is liable to his servant, if the master is guilty of negligence, if he orders the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur it. Even if the servant has some knowledge of the attendant danger, his right to re-

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cover will not be defeated if in obeying the order he acts with a degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work, the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary peril. The servant has a right to rest upon the assurance that there is no danger which is implied by such order, provided this instruction is to be read and construed with the following instructions, which are part of this instruction."

It will be observed that there is no allegation in either count of the declaration charging that appellant or its vice-principal gave any orders or directions to Still to perform any hazardous work and that he was injured as the result of obeying the same. The *gravamen* of the negligence charged is the failure of appellant to use reasonable care to provide reasonably safe appliances for the use of Still and its other servants. The instruction quoted was therefore inapplicable under the pleadings, and directed the attention of the jury to grounds of liability other than those charged in the declaration. They were thus misled, and it is impossible to determine whether or not appellant was prejudiced thereby. A majority of the court are of the opinion that the error in giving the instruction in question is not cured by the other instructions in the series, and that the judgment of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded.

People, etc., for use of Levi W. Sholtey, Appellant, v. Thomas Crowe et al., Appellees.

DAMAGES—*when allegation of special, essential.* The rule is that whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent surprise of the defendant which might otherwise ensue on the trial, the plaintiff must in general state the

particular damage which he has sustained, or he will not be permitted to give evidence of it.

Trial of right of property. Appeal from the Circuit Court of Ford county; the Hon. GEORGE W. PATRON, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

CHARLES M. PEIRCE and SCHNEIDER & SCHNEIDER, for appellant.

SIGMUND LIVINGSTON, CLOUD & THOMPSON and FRANK LINDLEY, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

Upon the reversal of a former judgment in this cause and the remandment of the same to the Circuit Court (130 Ill. App. 349), the cause was submitted to another jury upon the issues whether there was any record of the supposed judgment of the County Court in the proceedings for the trial of the rights of property, and whether the property taken by Crowe was that of Otto and Mary Taylor or of Sholtey. Both issues were established in favor of appellant. At the close of all the evidence the court instructed the jury to find the issues in favor of the plaintiff and assess his damages at one cent. Upon a verdict so returned, judgment was rendered in debt for the penalty of the bond and for one cent damages.

The chief controversy upon the trial was as to the amount of damages to which Sholtey was entitled under the pleadings. After he had proved the taking of the property, appellees, in mitigation of damages, proved that the same had been returned to the possession of Sholtey. Sholtey then offered to prove in rebuttal that in order to procure said return of the property he had been compelled to pay a large sum of money for traveling and other expenses, court costs and attorney's fees; but the court held such evidence improper under the pleadings. He then sought further to prove the fair

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cash value of the property at the time it was levied upon, and that when returned it had materially depreciated in value. This, too, the court held improper, for the same reason. We are of opinion that the ruling of the court was proper. If Sholtey desired to recover special damages he should have claimed the same in his declaration. The rule is that whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent surprise of the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. 1 Chit. Pl., 397. It follows that there being no proof of other than nominal damages the court properly instructed the verdict returned.

Various other reasons are assigned for reversal, none of which we deem meritorious. The judgment of the Circuit Court was warranted and will therefore be affirmed.

Affirmed.

Joseph Miller, Appellee, v. Kelly Coal Co., Appellant.

1. PROXIMATE CAUSE—*defined*. The proximate cause of an injury is that act or omission which immediately causes and without which the injury would not have happened, notwithstanding other conditions or omissions concurred therewith.

2. NEGLIGENCE—*what does not excuse*. The presence of a concurring or intervening cause does not excuse liability for negligence which proximately results in the injury.

3. MASTER AND SERVANT—*what risk not assumed*. No duty of inspection or inquiry is imposed upon the servant, and he has the right, in the absence of knowledge or means of knowledge to the contrary, to assume that the master would not supply him with improper means to perform his work, as in this case a vicious mule.

Action in case for personal injuries. Appeal from the Circuit

Miller v. Kelly Coal Co., 145 App. 452.

Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

· BUCKINGHAM & TROUP, for appellant.

S. F. SCHECTER and ACTON & ACTON, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case by appellee against the appellant corporation to recover damages for personal injuries sustained by appellee while working as a mule driver in appellant's mine. The jury returned a verdict in favor of appellee and assessed his damages at \$3,000. Judgment was rendered thereon. To reverse such judgment this appeal is prosecuted. The first count of the declaration under which the verdict was returned alleged in substance, that appellee on May 31, 1907, was working for defendant as a mule driver and in the usual course of his employment was engaged in hauling coal along the sixth northwest entry; that the defendant negligently furnished the plaintiff with a mule that was vicious and disposed to kick, and otherwise to be and become dangerous and unmanageable, of which facts the defendant was then and there well aware, and of which the plaintiff had no notice; that on the morning of the second day the plaintiff had driven said mule, he was hauling coal along said entry, and that when about opposite room 30 of said entry the said mule, without provocation other than its vicious disposition, as aforesaid, began kicking and struck plaintiff and knocked him down in front of the car; that because of a gob of debris that defendant had permitted to accumulate there on either side of said track, plaintiff was unable to get away, and was caught beneath said car loaded with coal, and the car pulled up against and upon him, thereby injuring him.

Appellee testified that he had been driving along the entry where he was injured, for about three months

prior to the day he was injured; that the accumulation of gob along the entry at the place he was engaged was about as high as the entry itself and extended close to the side of the car; that he had known of the proximity of the gob ever since he had driven in the entry; that upon his first trip in the morning of the second day he had driven this particular mule, it began kicking; that after the mule kicked him the first time he stepped off the car to one side and tried to climb over the gob, but was unable to do so; that the mule kicked him again and he fell under the car, and that if it had not been for the presence of the gob he would have escaped injury. There is evidence tending to show that the mule was vicious and disposed to kick, and that appellant had notice through a former boss mule driver of such propensity, and we are unable to say that the jury was unwarranted in so finding.

It is first urged that the presence of the gob was the proximate cause of the injury; that inasmuch as appellee knew of the presence of the gob and continued to work without complaint, he assumed the risk of injury therefrom. The proximate cause of an injury is that act or omission which immediately causes and without which the injury would not have happened, notwithstanding other conditions or omissions concurred therewith. 1 Thomp. Neg. 56; Weick v. Lander, 75 Ill. 93; Carterville Coal Co. v. Cook, 129 Ill. 152. It is obvious that in the case at bar the immediate cause of appellee's injuries was the kicks he received from the mule; that had not the mule kicked, appellee would not have been harmed by the presence of the gob. Even though the gob be held to have been a concurring or intervening cause of the injury, appellant would be nevertheless liable for the reason stated.

The assignment of error that the damages are excessive, is not argued by counsel. The contentions that the court erred in admitting improper evidence, and in improperly giving an instruction for the plaintiff rel-

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ative to the assessment of damages, are therefore unnecessary to be considered.

It is urged that the court erred in giving an instruction that if the jury believed from the evidence that the plaintiff had proved his case as set forth in the first count of the declaration, it was their duty to find in his favor, for the reason that it did not negative the assumption of risk. There was no evidence which would have justified the jury in finding that appellee had knowledge of the disposition of the mule to kick, or that by the exercise of due care he would have acquired such knowledge, or that he had the same or equal means as appellant of ascertaining such fact. No duty of inspection or inquiry was imposed upon him, and he had the right, in the absence of knowledge or means of knowledge to the contrary, to assume that appellant would not furnish him with a vicious mule. The risk was clearly not ordinarily incident to his employment. The question of assumed risk was not involved in the case, and any inaccuracies in other instructions criticized could not have been harmful to appellant.

There was sufficient competent evidence in the record to warrant the verdict, and the judgment will be affirmed.

Affirmed.

Walter Mathias, Appellee, v. George W. Miller, Appellant.

INJUNCTIONS—when should be denied. If a remedy at law exists, as in this case for replevin, an injunction should not be awarded.

Bill for injunction. Appeal from the Circuit Court of Moultrie county; the Hon. W. G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

WALTER EDEN and EDEN & MARTIN, for appellant.

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R. M. PEADRO and M. A. MATTOX, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court refusing to dissolve an injunction. The following facts are averred in the bill: Peter Mathias, the father of appellee, leased from the defendant Miller 160 acres of land for the year ending March 1, 1908, at a rental of \$1100, payable in equal installments on October 1, 1907, and January 1, 1908. On March 15, 1907, Peter Mathias sublet to appellee 80 acres of said land, upon his agreement to pay one-half the rent stipulated, whereupon appellee went into possession of said 80 acres and raised crops thereon. In August, 1907, Peter Mathias was adjudged bankrupt, and his trustee Webb took possession of all his property and appraised the same. Appellant then filed against the estate of said bankrupt his claim for rent due under the lease, in the sum of \$1100, which claim was allowed by the bankruptcy court as a first lien upon the crops belonging to said bankrupt, which were of the value of \$1300. On September 28, 1907, appellee tendered appellant \$520, the amount that he had agreed to pay to his father as rent for the land sublet by him, but appellant refused to accept the same, whereupon said sum was deposited in a bank with instructions to pay the same to appellant upon presentation of a receipt therefor. The money so tendered was borrowed by appellee, and payment of the same secured by a mortgage upon personal property including the crop raised by him upon the premises rented by him of his father. On October 16, 1907, appellant caused a distress warrant to be issued against the property of Peter Mathias and to be levied upon the crops which appellee had raised upon the premises in question. Upon the return of the distress warrant into court, appellant intervened in the proceeding, and on November 19, 1907, without notice to appellee, and with full knowledge that the property was that of appellee, procured

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an order for the sale of such of said property as was perishable. A temporary injunction was ordered against appellant, in accordance with the prayer of the bill, restraining him from further interference with said property or the rights of the orator in his management, control and sale of the same, conditioned upon appellee paying into court the sum of \$550 for the use of appellant. On April 28, 1908, a supplemental bill was filed by appellee, setting up that on the 11th day of April, 1908, a decree was entered by the bankruptcy court ordering the trustee to pay to appellant the sum of \$550, which amount appellant refused to accept. A motion to dissolve said injunction was heard by the court upon affidavits, and denied.

We are of opinion that the chancellor erred in refusing to dissolve the injunction. Appellee had a complete and adequate remedy at law. It is manifest that if the property levied upon was his property and not that of his father, he could have proceeded by replevin to obtain possession of the same, or have had his rights protected and adjudicated by intervening in the distress proceeding, or by a trial of the right of property under the statute. The decree of the Circuit Court will accordingly be reversed and remanded with directions to dismiss the bill for want of equity.

Reversed and remanded with directions.

**Lydia A. Edwards, Appellant, v. W. Scott Edwards,
Appellee.**

1. **REPEAL**—*when not effected by implication.* A repeal by implication is not favored in the law, and a later statute will never be held to repeal an earlier one, unless they cannot be reconciled. It is the duty of the court to construe them so as to avoid a repeal, if such a construction can be given, and a statute will never be held to be repealed by implication if it can be avoided by any reasonable hypothesis.

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2. *REPEAL—when general law does not affect special.* A subsequent law which is general does not repeal a former one which is special and intended to operate on a particular subject, unless it is impossible that both should be enforced. The one does not repeal the other, if both may exist together, and the court will seek for such a construction as to reconcile them, and thus give effect to the legislative will as expressed in each act.

3. *ADMINISTRATION OF ESTATES—when next of kin not entitled to.* Section 9 of chapter 86, pertaining to idiots, drunkards and spendthrifts, is not repealed by section 18 of the Administration Act, and the conservator of the deceased, rather than the next of kin, is entitled to administer.

Petition for letters of administration. Appeal from the Circuit Court of Fulton county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

MARVIN T. ROBISON and CHARLES F. ROBISON, for appellant.

W. SCOTT EDWARDS and HARRY M. WAGGONER, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal by Lydia A. Edwards from a judgment of the Circuit Court setting aside an order of the County Court by which she had theretofore been appointed administratrix of the estate of her deceased husband, Samuel Edwards, and appointing appellee, W. Scott Edwards, who was acting as conservator of said Samuel Edwards at the time of his death, to administer said estate. The appellee predicated his right to administer upon section 9 of chapter 86 of the statutes, which provides that "Whenever any lunatic, idiot, drunkard or spendthrift shall die seized or possessed of any real or personal estate, then such conservator shall have full power and authority under the letters issued to him or her, to make full settlement of the estate of said deceased ward, without further letters of administration, in such time and manner as

is required by law of administrators of the estates of deceased persons. *Provided* this shall not apply to non-resident conservators." Rev. Stat. 1905, p. 1347. Appellant claims the right, as widow of said decedent, by virtue of section 18 of the Administration Act, which as amended, provides for the grant of letters of administration of the estates of all persons dying intestate, by certain persons as therein named, giving preference to the surviving husband or wife, if any. Rev. Stat. 1905, p. 107. It is contended by appellant that inasmuch as the latter section was enacted, as amended, subsequently to the adoption of the former section, it repealed the former by implication. The cause having been submitted to the court upon an agreed statement of facts this is the only question presented for determination.

It is well settled that a repeal by implication is not favored in the law, and a later statute will never be held to repeal an earlier one, unless they cannot be reconciled. It is the duty of the court to construe them so as to avoid a repeal, if such a construction can be given, and a statute will never be held to be repealed by implication if it can be avoided by any reasonable hypothesis. It is also the rule that a subsequent law which is general does not repeal a former one which is special and intended to operate on a particular subject, unless it is impossible that both should be enforced. The one does not repeal the other, if both may exist together, and the court will seek for such a construction as to reconcile them, and thus give effect to the legislative will as expressed in each act. *Village of Ridgway v. Gallatin Co.*, 181 Ill. 521; *Fowler v. Pirkins*, 77 Ill. 271; *Trausch v. County of Cook*, 147 Ill. 534; *Lang v. Friesenecker*, 213 Ill. 598. Unless, therefore, the statutes in question can be said to be so directly and positively inconsistent with and repugnant to each other that under no reasonable hypothesis can both be enforced, the contention is without force. *Lang v. Friesenecker, supra.*

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The former section is special in that it operates upon a particular subject, that of the administration of the estates of incompetent persons upon whose conservators are conferred unusual powers. We perceive no reason why the respective sections cannot be fairly reconciled and each be consistently enforced independently of the other. The effect of such construction would be to preserve the preferences conferred by the latter section, except in the special case mentioned in the former. No violence would thus be done to the terms of the respective acts, nor, as we believe, would the legislative intent as expressed in each act, be thereby defeated. The purpose of the former section, which was evidently to save the expense of administering upon the estates of deceased persons whose estates were already under the control of conservators and undergoing settlement by the latter (*Lang v. Friesenecker, supra*), is thus recognized and kept effective.

It is further contended by appellant that in the absence of any proof by appellee that he was a resident conservator his appointment was invalid. If he was disqualified to act for the reason stated, it was the duty of appellant to have established such fact upon the *de novo* hearing upon the petition in the circuit court.

The judgment will be affirmed.

Affirmed.

Hugh G. Park, Appellee, v. Mary J. Lehman, Appellant.

MASTER IN CHANCERY—*when findings of fact not disturbed.* Findings of fact by a master, approved by the chancellor, will not be disturbed on review, unless manifestly against the weight of the evidence.

Bill for specific performance. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding.

Park v. Lehman, 145 App. 460.

Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

C. E. SCHROLL, for appellant.

MILLS BROS., for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a bill by appellee to enforce the specific performance by appellant of an alleged agreement for the extension of a lease. The chancellor entered a decree granting the relief prayed in the bill. The bill avers that appellant was the owner of a life estate in certain farm lands, and that she executed to appellee a lease of the same for the period of three years from March 1, 1905; that during the year 1906 the barn on said premises was in bad repair, and appellee applied to appellant to construct a new one, but that appellant represented that she did not have the necessary money to do so, and that thereupon appellee agreed that if appellant would extend his lease until March 1, 1912, he would furnish the money necessary to build a new barn, the amount so furnished to be credited *pro rata* upon the notes to be given by him for rent during the extended period; that he had expended in tearing down the old barn and constructing a new one the sum of \$517.58; that he had applied to appellant to extend said lease and make proper credits upon his notes, but that she had refused to do so. The cause was referred to the master, who found the facts to be substantially as alleged in the bill, and recommended that a decree be entered in accordance with the prayer thereof.

It is conceded by appellant in argument that appellee is entitled to have his lease extended for the period claimed, the only point in dispute being as to what amount should be credited upon his rent notes. It is insisted that under the agreement for the extension of the lease appellant was to pay \$300 only on account of the construction of the barn. The only question in-

Wabash Realty & Loan Co. v. Krabbe, 145 App. 462.

volved, therefore, is one of fact. The evidence is in conflict. The conclusions of the master, who saw and heard the witnesses, upon the issue, are in favor of appellee, and the chancellor has approved such finding. We cannot say that such conclusions are against the manifest weight of the evidence, and therefore would be unwarranted in disturbing the same. Day v. Wright, 233 Ill. 218. The decree of the circuit court is affirmed.

Affirmed.

Wabash Realty & Loan Company, Appellant, v. Fred A. Krabbe, Appellee.

LANDLORD AND TENANT—*how written lease may be surrendered.* A written lease, even though it be under seal, may be surrendered by a parol agreement or by an agreement inferable from the conduct of the parties.

Assumpsit. Appeal from the County Court of Champaign county; the Hon. THOMAS J. ROTH, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

SCHAEFER & DOLAN, for appellant.

SAVAGE & WOODS, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit brought November 1, 1907, upon a written lease, for the recovery of rent alleged to be due to the appellant corporation from appellee Krabbe, for certain premises in the city of Champaign, the term of said lease being five years from June 1, 1904, and the rental fifty dollars per month, payable on the first day of each month. The case was tried in the County Court, and the judgment rendered upon

the verdict of the jury in favor of the defendant. In addition to the general issue, appellee pleaded, first, that the lease was surrendered on September 1, 1905, at which time no rent was due upon the same; and second, *actio non* as to so much of the rent as became due after May 30, 1907, for the reason that it was stipulated in and by the lease that appellee should occupy the premises for saloon purposes and for no other purpose; that it was therein provided that beer manufactured by the Terre Haute Brewing Company should be given the preference in the sale of beer upon said premises, and that the city council had adopted an ordinance prohibiting the sale of intoxicating, malt, vinous or fermented liquor within the limits of said city, which ordinance became effective May 20, 1907; by reason of all of which appellee could not thereafter legally conduct a saloon upon said premises, nor use the same for any other purpose whatsoever, whereby said lease became null and void and the premises were and continued to be until the time of the commencement of the suit, rendered useless for the purpose for which the same were rented. Demurrers were interposed to said special pleas. The court sustained the same as to the first and overruled it as to the second. No replication, however, was filed to said second plea.

The evidence shows that appellee occupied the premises for saloon purposes from June 1, 1904, until September 5, 1905, when the business was purchased from him by one Mascher. No formal transfer of the lease was made, and Mascher continued to conduct the saloon upon the premises until March, 1907, during which time he paid the rent to appellee's agent. The rent which it is sought to recover in the present suit is for the period of from March to November, 1907, inclusive.

It will be observed that the second special plea does not purport to meet the entire cause of action, but only the claim for rent claimed to have accrued subsequent

to May 20, 1907. The verdict returned in favor of the defendant must therefore have been rendered upon the theory that a surrender of the lease had been established under the general issue. Otherwise a verdict for the rent which accrued subsequently to the month of February, and prior to May 20, 1907, would necessarily have followed. Therefore, the action of the court in overruling the demurrer to the second plea, and the admission of the ordinance in evidence, if error, could not have been prejudicial, and it is unnecessary to determine the question of the sufficiency of the plea.

Appellant insists that the verdict of the jury is against the weight of the evidence upon the issue as to whether the lease was in fact surrendered by appellant. It is well settled that a written lease, even though it be under seal, may be surrendered by a parol agreement, or by an agreement inferable from the conduct of the parties. *Stobie v. Dills*, 62 Ill. 432; *Fry v. Patridge*, 73 Ill. 51; *Dills v. Stobie*, 81 Ill. 202; *Alschuler v. Schiff*, 164 Ill. 298. While the evidence is in conflict upon this issue, we cannot say that the surrounding facts and circumstances disclosed by the evidence were insufficient to warrant the finding that the lease and premises were surrendered to appellant by appellee and accepted by it, thus releasing appellee from further liability under the lease.

We find no reversible error in the rulings of the court upon the instructions or in the admission of evidence. The judgment of the circuit court is affirmed.

Affirmed.

Joseph A. Miller, Administrator, Appellant, v. Peter Mathias and Mary Mathias, Appellees.

1. EVIDENCE—*when party incompetent by virtue of interest.* Where the adverse party sues or defends in a representative capacity, the other party in interest is incompetent.

2. EVIDENCE—*when admissions of one party bind another.* The admission of one joint lessee is general evidence against both lessees.

Assumpsit. Appeal from the County Court of Moultrie county; the Hon. E. D. HUTCHINSON, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

WALTER EDEN and EDEN & MARTIN, for appellant.

R. M. PEADRO and M. A. MATTOX, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action by appellant to recover rent alleged to be due under a verbal lease by the terms of which appellant's intestate, Salathiel Miller, rented to appellees certain farm lands for the year beginning March 1, 1905, at the rental of \$1,440. The jury returned a verdict in favor of the defendants, upon which judgment was duly rendered. It is conceded that all of said rent has been paid except the sum of \$400, which is the amount now in controversy. Upon the trial appellant testified that all he knew had been paid on account of the rent was \$1,050, which would leave still due the sum of \$400, and that he had heard appellees say that they had rented the land in question from his father, his intestate. Counsel for appellees then contended that they were entitled to show the entire conversation between the deceased and the witness, and under such pretext the court, over the objection of appellant, permitted Mrs. Mathias to relate

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in detail a conversation which she claimed to have had with the deceased and to have repeated to appellant after his appointment as administrator. She was thus allowed to testify in effect that she told appellant that she paid the deceased \$400 in September, 1906; and that she at that time exhibited to appellant an account book containing an entry pertaining to the transaction made on the day the money was paid. A party to a suit of the present character is an incompetent witness under the statute as to any transaction with the deceased. There was nothing in the cross-examination of the witness which rendered the conversation in question competent. The jury doubtless believed from the testimony of Mrs. Mathias that she had paid the deceased the sum in controversy in the case, on the day in question, that she had shown him an entry to that effect in her account book and that he failed to object to the correctness of the same. The error was therefore clearly prejudicial to appellant.

To sustain his contention that the sum in controversy was still due under the lease, appellant proved certain alleged admissions by Peter Mathias which tended to support such claim. The court instructed the jury that such admissions were not binding upon Mary Mathias. This also was error. Being joint lessees of the premises, it will be presumed in the absence of proof to the contrary, that they shared in the benefits. They therefore had a joint interest in the suit, and an admission by one was general evidence against both. 1 Greenleaf Evidence, sec. 174; *McMillan v. McDill*, 110 Ill. 51.

For the reasons stated the judgment is reversed and the cause remanded.

Reversed and remanded.

M. J. Ganey et al., Appellants, v. Edward Hohlman et al., Appellees.

PRINCIPAL AND SURETY—*when alteration of original undertaking does not release latter.* Where the alterations in the terms of a contract did not operate to the prejudice of the surety, or put him in worse position, or increase his risk, or impair the ultimate liability over to him, such alteration does not operate by way of discharge.

Action of debt. Appeal from the Circuit Court of Montgomery county; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

AMOS MILLER, L. V. HILL and JESSE PEEBLES, for appellants.

JETT & KINDER, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action of debt on a penal bond in the sum of \$2,000 executed by appellees Mohlman and Milnor, to appellants, conditioned upon the faithful performance by Mohlman of a certain contract entered into contemporaneously therewith between appellants and Mohlman, by the terms of which Mohlman agreed to furnish all the material and do all the work necessary in the construction of two brick buildings in the city of Gillespie, according to certain plans and specifications. The breach of the bond charged in the declaration is that appellee Mohlman did not pay for all the material necessary to complete the two buildings, by reason whereof appellants were compelled to pay for such materials the sum of \$1,404.93. Both defendants filed pleas alleging performance and denying that the plaintiffs had been compelled to furnish or pay for materials as alleged. Appellant Milnor filed two further pleas, alleging, first, that the plans and speci-

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fications had been modified and changed by the parties to the contract, without his knowledge, whereby he was released; and second, that he had notified appellants not to pay Mohlman any further sums on account of said buildings until all materials had been paid for, and that at the time of such notice there was more money due to Mohlman from appellants than they had since been compelled to pay.

Issue was joined on the several pleas, and a trial had before the court without a jury, resulting in a judgment against appellees in debt for \$2,000, and for \$1 damages. The evidence discloses that Ganey and the bank owned adjoining lots having a total frontage of 66 feet, upon which they arranged to erect two buildings jointly, that of the bank to be 20 feet and that of Ganey to be forty-six feet in width. Plans and specifications were prepared, and the contract for erecting the buildings let to Mohlman at \$9,998.77, of which the bank was to pay \$3,666.97 and Ganey \$6,331.80. Before work was begun on the buildings, it was decided to build the bank building two feet narrower, which was done. With this exception the buildings were completed in accordance with the original plans and specifications. Thereafter additional work was done by Mohlman upon both buildings, the materials for which were paid for by him. Mohlman failed, however, to pay a balance of \$1,000 due for lumber used in filling the original contract, and a decree for a lien for that amount was obtained against appellants, which they were compelled to pay, together with the sum of \$301.32 costs of the proceeding.

We are of opinion that the change in the contract whereby the width of the bank building was lessened two feet, did not serve to release the surety Milnor upon his bond. The evidence shows that although as a result of the change, the actual cost to Mohlman, the contractor, was less than had he built the building the full width prescribed by the original contract, he was paid the full original price therefor. The altera-

tion in the terms of the contract did not operate to the prejudice of the surety, or put him in worse position, or increase his risk, or impair the ultimate liability over to Mohlman to him, one or more of which elements must be present before a surety will be released. Appellees contend that inasmuch as the contract and the bond did not state specifically that the contractor was to pay for the materials, but used the words "furnish all the material and labor therefor," Mohlman was under no obligation to pay for the materials, and consequently there was no breach of the bond. We construe the language quoted to mean that Mohlman was to furnish the materials necessary, free of cost to appellants. In the cases cited by appellees in support of the contrary view, it will be observed that the actions were brought by or for the benefit of third parties.

Under the foregoing views it will be unnecessary to determine the sufficiency of the cross errors assigned.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Rogers Grain Co., Appellant, v. S. W. Jones, Appellee.

1. **CONTRACTS**—*what aids construction of.* The construction of a contract placed thereon by the parties will be considered by the court in determining the true meaning and effect thereof.

2. **VERDICT**—*when not disturbed as against the evidence.* A verdict not clearly against the weight of the evidence will not be set aside on review.

3. **VENDOR AND VENDEE**—*remedy for refusal to accept.* If a vendee refuses to accept and pay for merchandise at the contract price, the vendor has the right to resell such merchandise and charge the vendee with the difference between the contract price and that realized by sale.

Assumpsit. Appeal from the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this

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court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

REARICK & MEEKS, for appellant.

ACTON & ACTON, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit in assumpsit by appellant, for the recovery of money alleged to have been advanced by it to appellee for oats purchased by it and which appellee failed to deliver. A trial by jury resulted in a judgment for the defendant, from which the plaintiff appeals. The evidence shows that the parties entered into a written contract whereby appellee sold to appellant 4,000 bushels of white oats at thirty-two cents a bushel to be delivered at Collison, Illinois, on or before September, 1906, "in sound and good condition." Appellant then advanced to appellee \$400 on account of the purchase. On August 28th appellee began delivering oats on account of the contract. After 279 bushels had been received and weighed, Rogers, the vice-president of appellant, declined to accept the oats yet undelivered, claiming that they were damp, stained, bleached and musty. Appellee then hauled the remainder of the oats to Muncie and sold them at twenty-six and one-half cents per bushel. He afterwards submitted a statement to appellant, in which he charged it with the oats delivered, the difference between the contract price for those refused, and the price realized for the same at Muncie, together with the expense of hauling them to Muncie. He credited appellant with the \$400 advanced, which left a balance due of \$36.35, which sum he tendered to appellant. Appellant refused to accept the same and brought the present suit. The tender was admitted on the trial, and the main issues of fact involved were as to what quality of oats was required to fill the contract, and whether or not those tendered by appellee met such requirement.

Appellant claimed upon the trial that it had a right to demand strict performance of the exact terms of the contract, and that the grain tendered should have been white oats "in sound and good condition," while appellee insisted that a reasonable, substantial performance was all that was essential, and that he was bound only to furnish white oats in reasonably sound and good condition. A number of witnesses called by appellant testified that in the grain trade there was a distinct difference in meaning in the two expressions, and that they represented different grades. There is also evidence in the record tending to show that white oats in sound and good condition would grade as No. 2 in the market, and that those which were at least seven-eighths white and in reasonably clean, sound and dry condition, would grade as No. 3. Smith, the general manager of appellant at Collison, testified that under instructions of appellant, No. 3 oats were uniformly received by him under contracts like the one in question.

Appellee testified that at the time Rogers, the vice-president of appellant corporation, objected to receiving the oats, he, witness, asked him what grade he wanted on the contract, and that Rogers replied he wanted No. 3 white. Notwithstanding Rogers denied that such conversation occurred, the jury, who were the sole judges of the credibility of the witnesses and the weight to be given to their testimony, doubtless believed appellee. Under the construction thus placed upon the contract by both the vice-president and general manager of appellant, which may properly be considered in determining the true construction of the language of the contract (*Coal Co. v. City of Bloomington*, 234 Ill. 90) it was only necessary that the oats should grade as No. 3 white oats; that is, should be seven-eighths white and in reasonably sound, clean and dry condition. There was evidence tending to show that they were. We cannot say that the finding of the jury that the oats tendered filled these require-

ments was manifestly contrary to the evidence, and are therefore not at liberty to disturb the same.

One Swisher, a witness called by appellant, testified that the oats tendered by appellee were damp and bleached. For the purpose of impeaching the witness by showing that he had expressed a different opinion as to the same oats, appellee was permitted to prove that a few days after the tender, a load of the same oats and in the same condition, was delivered at appellant's elevator where Swisher was employed, and that Swisher stated that "if all the oats that come in were like those, they would be all right." It is insisted that such evidence was incompetent. We do not think so. The variant statement was directly connected with a fact that tended to establish appellee's case, and was thus relevant. Its incompetency as substantive evidence did not render it irrelevant for the purpose of impeachment. We are satisfied that the jury did not understand that appellee's first instruction as to agency applied to the statement in question, but to the acts of Rogers. If appellant wrongfully refused to accept and pay for the oats at the contract price, appellee had the right to re-sell them and charge appellant with the difference between the contract price and that realized at the sale. The jury was not unwarranted in finding that the re-sale at Muncie was made in good faith and in the mode best calculated to procure the real value of the oats (*Morris v. Wibaux*, 159 Ill. 627), and further, that Muncie was the best available market. Appellee also had the right to set off the additional and necessary expense of transporting the oats to Muncie. He was permitted to testify, without objection, that such expense amounted to \$70, and there is no evidence that such sum was unreasonable.

The judgment of the circuit court is affirmed.

Affirmed.

Reliable Plumbing and Heating Co. v. Dallenbach, 145 App. 473.

**Reliable Plumbing and Heating Company, Appellant,
v. William C. Dallenbach et al., Appellees.**

This case is controlled by the decision in *Brokaw v. Tyler*, 91 Ill. App. 148, and by that of *Haas Mfg. Co. v. Springfield Amusement Park Co.*, 236 Ill. 452.

Mechanic's lien. Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908; modified December 16, 1908.

F. M. & H. I. GREEN, for appellant.

H. LEONARD JONES, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from a decree sustaining a demurrer to and dismissing the interpleader of appellant in a mechanic's lien proceeding instituted by appellee Boyer, for the purpose of establishing a lien against a certain building, for materials furnished and work performed thereon. The interpleader avers that during the year 1896, several of the appellees, who were at the time the owners of the premises in question, leased the same to appellee Keller for use as a theater only; that the lease contained the following provision: "Privilege is accorded to the second party (lessee) to make alterations and repairs to the exterior and interior of said building, all of which is to be paid for by the second party * * * ." It is further averred that the building as then constructed was wholly unfit to be used as a theater, and that its construction and interior arrangement had to be remodeled; that the lease to Keller was made with the specific understanding between the owners of the property and the lessee that he should remodel the interior of the building so as to make it suitable for theater purposes, the only purpose for which it could be used under the specific terms of the lease; that the heating

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and plumbing system was entirely inadequate to be used in the building when the changes were made, without altering and remodeling the same, and that it was understood by the owners that the same should be remodeled and changed by the lessee to fit the premises for use as a theater; and further, that the owners agreed that in remodeling the heating and plumbing system, so much of the old material in the building might be used as was available; that Keller thereupon entered into a contract with appellee Boyer to do the carpenter work in the general construction of the interior, and with appellant to so remodel and repair the heating and plumbing systems in the building, as to fit the same for use as a theater; that appellant thereupon entered upon and completed the performance of the said contract; that during the progress of the work the owners of the building were frequently in the building and saw that the heating and plumbing system was being changed and installed and well knew what was being done, and by whom; that after the contract was prosecuted to completion, the then owners sold and conveyed the premises to the defendants Coffin and Dallenbach, and assigned to them the lease to Keller; and further, that appellant had filed a claim for lien with the circuit clerk within the time required by the statute.

The vital question involved in this case is whether or not appellant can enforce a lien against the title of the defendants Coffin and Dallenbach to the premises in controversy, or whether its only relief is against the leasehold interest of Keller. Under the views expressed by this court in *Brokaw v. Tyler*, 91 Ill. App. 148, and by the Supreme Court in the recent case of *Haas Mfg. Co. v. Springfield Amusement Park Co.*, 236 Ill. 452, the chancellor erred in not granting the relief asked by appellant's interpleader. The decree will therefore be reversed and the cause remanded.

Reversed and remanded.

**The Sanganois Club, Appellant, v. General Lane et al.,
Appellees.**

INJUNCTIONS—when should not be awarded without notice. An injunction should not be granted without notice where it does not appear from the bill or affidavit supporting the same that the rights of the complainant would have been unduly prejudiced if notice had been given to the defendants of the application. This rule is not affected by the fact that some of the defendants named in the bill reside in another county from that in which the application was made.

Bill for injunction. Appeal from the Circuit Court of Cass county; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908. Rehearing denied December 16, 1908.

L. A. JARMAN, for appellant.

MILTON McCLURE, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellant, a corporation organized for the purpose of carrying on a hunting club, filed a bill to restrain appellees and others from going upon its land for the purpose of hunting, shooting, or other purposes. A temporary injunction was ordered by the master in chancery, without notice to the defendants, and the writ served upon ten of their number. Upon motion of all the defendants such injunction was thereafter, upon hearing, dissolved by the chancellor. Written suggestions of damages were thereupon filed by the defendants. After hearing evidence in support thereof, a decree was entered against the complainant, in favor of all the defendants, for \$100 solicitor's fees, and in favor of Kelly and Morris for \$9 each. The complainant appealed.

The bill avers in substance that the complainant was and had been for several years, in possession of the

land in question as owner and lessee; that the defendants had not and never had claimed any title or interest in or right to possession of said lands; that the same being overflowed were only valuable for hunting and fishing purposes; that the complainant had expended several thousand dollars for and upon said lands that it and its members might use the same for such purposes; that the defendants had been repeatedly warned, by public and personal notice, not to hunt or trespass upon said land, but that they had repeatedly and almost continuously for a year then last past, and were from day to day, against the protest of the complainant, wilfully, illegally and maliciously trespassing upon said lands, with boats and decoys, hunting and shooting thereon, and would continue without cessation to so trespass unless restrained; that they were insolvent, and that the damages from such trespassers were of such a nature as are incapable of ascertainment in a court of law; that the defendants were not residents of Cass county and could not conveniently be served with notice, and that they had threatened to continue to so trespass.

No objection is raised to the amount of the damages assessed as solicitor's fees. The other damages are too insignificant in amount to warrant discussion or consideration. The remaining errors argued are that the injunction was improperly dissolved, and that damages should not have been assessed before a final hearing of the cause upon the merits. We think the temporary injunction was properly dissolved, for the reason that it does not appear from the bill or affidavit supporting the same, that the rights of the complainant would have been unduly prejudiced if notice had been given to the defendants of the application. It is manifest that no actual or substantial injury could have resulted from further trespasses of the character threatened. The fact that some of the defendants resided in another county did not obviate the necessity of notice. *Henderson v. Flanagan*, 75 Ill.

App. 296. It was not error to assess damages for solicitor's fees before the final hearing, inasmuch as the same were for services rendered solely upon the motion to dissolve.

The decree of the circuit court is affirmed.

Affirmed.

Ira S. Powell, Appellant, v. Robert W. Huey, Appellee.

1. **APPEALS AND ERRORS**—*when finding of chancellor not disturbed as against the evidence.* Where a chancery cause is heard in open court on oral testimony and the evidence is conflicting, the finding of the chancellor will not be reversed unless error is palpable.

2. **SPECIFIC PERFORMANCE**—*when awarded; when not.* The specific performance of a contract will only be enforced where the terms are clear, certain and unambiguous, either admitted by the pleadings or proven with a reasonable degree of certainty by the evidence. Even in cases where all of these requirements are present, specific performance is not a matter of right, but rests in the sound discretion of the court, to be determined from all the facts and circumstances of the particular case.

3. **FORECLOSURE**—*what does not bar relief.* A bill of foreclosure, although it does not show the real consideration for or the precise amount due upon a mortgage, will authorize a decree, although the proofs may show a less sum to be due than was claimed, or a state of facts not averred in it, if these facts are not incompatible with the allegations in the bill.

4. **MORTGAGE**—*when matures prior to express date of maturity.* A mortgage given for purposes of indemnity matures when the person indemnified is required to meet the principal debt, such maturity taking effect to the extent of the obligation paid by the person indemnified, regardless of the date of maturity named in the mortgage.

Foreclosure. Appeal from the Circuit Court of Hancock county; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed December 23, 1908.

Statement by the Court. This is an appeal from a decree of the Circuit Court foreclosing a mortgage

given by appellants, William A. Powell and Martha M. Powell, to appellee.

Two suits in equity and one at law involving the same series of transactions, but distinct as to the relief sought, were tried together by the circuit court without a jury upon the same evidence, with the agreement of counsel that separate judgments or decrees should be rendered, and that in the decision of each cause such part only of the evidence as was applicable to that particular cause should be considered. Separate appeals from the judgment and decrees rendered were perfected. Although not consolidated the same will be considered together.

The litigation grew out of the following state of facts: On September 24, 1903, for the purpose of indemnifying Robert W. Huey against liability as surety upon a note for \$800 given by William A. Powell to one Talbot and due August 18, 1904, and any further suretyship liability that might thereafter be incurred by him for the benefit of said Powell, William A. Powell and Martha M. Powell, his wife, executed a mortgage to said Huey upon two tracts of real estate owned by Powell one of which was known as the "home place" and the other as the "Coke farm." The mortgage upon its face purported to secure the payment of a promissory note for \$7,000 signed by the mortgagors and due September 24, 1908: also 5 interest notes for \$350 each, of even date with the mortgage, due in one, two, three, four and five years respectively. The mortgage provided in substance that if default was made in the payment of the principal sum or the interest thereon as it became due, then the principal note and all accrued interest and all indebtedness secured thereby should at once, at the option of the mortgagee, become due and payable, and the mortgage might at once be foreclosed. The mortgage further provided that the same was given subject to a prior mortgage to one Brown, to secure the payment of a note of William A. Powell for \$12,000 due September 24, 1908.

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Thereafter and prior to September 13, 1905, Powell and his wife conveyed the premises in question to their son, Ira S. Powell. On that day a written agreement was entered into by and between said parties, as follows, to-wit:

“MACOMB, ILL., Sept. 13, 1905.

“This is to certify that William A. Powell and Martha M. Powell have given Robert W. Huey a note and mortgage of \$7,000.00, dated September 24, 1903, to be held by said Robert W. Huey as security on notes given to him by Ira S. Powell and William A. Powell, and also for notes endorsed or signed by him with Ira S. Powell and William A. Powell. It is agreed that when all the notes owed by W. A. or Ira S. Powell or both of them to Robert W. Huey, and also the notes endorsed or signed by Robert W. Huey with Ira S. and W. A. Powell, are paid and canceled, then this mortgage and note are to be delivered to Ira S. Powell.

R. W. HUEY,
I. S. POWELL,
W. A. POWELL.”

At the same time Huey executed his note to the Union National Bank of Macomb for \$5,000, due September 13, 1906, with interest at 6% for the benefit of Ira S. Powell and William A. Powell, who in turn and in consideration thereof executed their joint note to Huey for \$5,000, due September 13, 1906.

Afterward, on August 4, 1906, Huey became surety for Ira S. Powell upon his note for \$4,541.37, payable to the Hancock County National Bank, and due November 4, 1906, which said note was given in renewal of a prior loan, the proceeds of which were received by William A. Powell. On September 10, 1906, a written contract was prepared which was signed by Huey in person, and purported to be signed by William A. Powell as agent for Ira S. Powell, by the terms of which Huey agreed to purchase the “Coke farm,” consisting of 150 acres, for the sum of \$18,750, the taxes of 1906 to be paid by Powell, and possession of the premises given September 24, 1906. It further

provided that as part of the purchase price Huey was to assume Powell's note for \$4,541 to the Hancock County National Bank and that he should pay the balance in cash on or before September 24, 1906, upon receipt of a deed for the premises.

There is evidence tending to show that it was verbally agreed by the parties that in payment of the remainder of the purchase price Huey was to assume and pay the Talbot note and interest amounting to \$848, and to cancel the \$5,000 note representing the note of Huey to the Union National Bank and upon which there was \$300 accrued interest due, and to assume the indebtedness to Brown to the extent of the balance; the remainder of said Brown mortgage indebtedness to be carried by Powell upon the "home place." On September 12, 1906, Ira S. Powell signed the said contract in person, thus ratifying the same. On September 24, 1906, Huey repudiated the alleged contract, claiming that his signature thereto had been procured by fraud and circumvention, whereupon Powell formally tendered a deed to him in accordance with said contract which he refused to accept. On October 6, 1906, Huey instituted an action in assumpsit against William A. and Ira S. Powell upon their \$5,000 note to him bearing date September 13, 1905, and on January 21, 1907, filed a bill to foreclose the mortgage given to him as aforesaid, purporting to secure the payment of a note for \$7,000. By his bill he alleged an absolute indebtedness upon the notes described in the mortgage. William A. Powell, Martha M. Powell and Ira S. Powell, who were made defendants to the bill, by their answer set up that there was no consideration for the giving of said mortgage; that the same was given to indemnify Huey against any loss he might sustain as surety for William A. Powell and for no other consideration or purpose; that Huey had not sustained any loss on said account, and that all of said notes were theretofore fully paid. On March 2, 1907, Ira S. Powell filed a bill against Huey praying specific

performance of the contract of sale in question. Huey answered the bill denying the payment of the note for \$4,541, which the bill averred had been made on account of said contract; denied that a deed was tendered, and asserted that the payment of said note for \$4,541 was made as surety for Powell, and that he, Huey, had paid divers other notes as surety for Powell, greatly in excess of \$7,000 and the interest thereon, and that said mortgage was a valid lien on the premises. Upon the hearing of all of said cases together, the court dismissed the bill for specific performance, rendered a decree of foreclosure and sale against the premises included in said mortgage, for the sum of \$8,483.61, and rendered judgment in favor of the plaintiff in the action of assumpsit for the sum of \$2,424. From said decrees and judgment appeals are prosecuted by the unsuccessful parties, the present appeal being from the foreclosure decree in question.

DAVID E. MACK, WILLIAM H. HARTZELL, JOHN W. WILLIAMS and JOHN D. MILLER, for appellants.

CHARLES J. SCOFIELD and APOLLOS W. O'HARRA, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

Although the evidence relative to the execution of the alleged contract sought to be enforced is in close conflict, we are of opinion that the testimony of appellee and S. H. Ferris was sufficient to warrant the chancellor in finding that the same was not knowingly executed by Huey, but that he understood he was signing an application for a loan upon his farm and the Coke farm, in case he decided to take the land, and that he was induced to sign the same through trickery and device practiced by William A. Powell. Furthermore there is evidence tending to prove that the terms thereof were so unconscionable and inequitable as to

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justify the chancellor in refusing to enforce the same. The Coke farm was valued in the alleged contract at \$125 an acre, while the evidence tends to show that it was worth not to exceed \$80 per acre.

Where a chancery case is heard in open court on oral testimony and the evidence is conflicting, the findings of the chancellor will not be reversed unless error is palpable. *Dyas v. Dyas*, 231 Ill. 367.

“A specific performance of contract will only be enforced where the terms are clear, certain and unambiguous, either admitted by the pleadings or proven with a reasonable degree of certainty by the evidence. Even in cases where all of these requirements are present, specific performance is not a matter of right, but rests in the sound discretion of the court, to be determined from all the facts and circumstances of the particular case. Specific performance is an equitable remedy which compels such substantial performance of the contract as will do justice between the parties. Inflexible rules cannot be laid down for the exercise of the power of a court of equity in granting specific performance. Every case of specific performance necessarily depends in a large degree upon its own special circumstances. In such proceedings the inquiry must be whether in equity and good conscience the court should specifically enforce the contract, and the decision involves the hearing of evidence of extrinsic facts. It is never decreed as a matter of course, even when a legal contract is shown to exist.

“If then the contract itself is unfair, onesided, unjust, unconscionable, or affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own right, or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by over-reaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscionable means, then a specific performance will be.

refused. It necessarily follows that a less strong case is sufficient to defeat a suit for a specific performance than is requisite to obtain the remedy." *Sugar v. Froehlich*, 229 Ill. 297, and cases cited.

Without extending this opinion by further detailing or discussing the evidence contained in the record, we are impelled to hold that the chancellor did not err in dismissing the bill for specific performance.

It is urged as ground for the reversal of the decree of foreclosure that there is a variance between the allegations of the bill and the evidence; that the bill being in the ordinary form of bills to foreclose, does not correspond with the proofs, which show that the mortgage and notes were given for the purpose only of indemnifying Huey against any loss or damage by reason of his having signed a note or notes as surety for William A. Powell.

"A bill of foreclosure, although it does not show the real consideration for or the precise amount due upon a mortgage, will authorize a decree, although the proofs may show a less sum to be due than was claimed, or a state of facts not averred in it, if these facts are not incompatible with the allegations in the bill." *Collins v. Carlile*, 13 Ill. 254.

It is also insisted that the mortgage which it is sought by the bill to foreclose was not due at the time the bill was filed, nor at the time of the entry of the decree of foreclosure; that notwithstanding the interest notes had matured, the mortgage having been given for the purpose of collateral security, did not mature until September 24, 1908.

By the express terms thereof, the interest notes payable on September 21, 1904, 1905, and 1906, respectively, were past due on January 21, 1907, upon which date the bill was filed. Appellee therefore had the right to exercise his option under the terms of the mortgage and declare the principal sum also due. If the mortgage be treated as one of indemnity only, as we think it should, and its literal effect disregarded,

it is obvious that when the mortgagee was compelled to pay any part of the indebtedness against which he was indemnified, the real mortgage indebtedness may be properly held to have, to that extent, matured, without regard to its express terms.

The evidence shows that prior to the time the bill to foreclose was filed, appellee was compelled to pay the Talbot note of \$800 upon which he was surety for William A. Powell; that on September 25, 1905, he paid the sum of \$2,884.90 on account of the note given by him to the Union National Bank as collateral to the note of William A. and Ira S. Powell upon which there was then due with interest the sum of \$5,310; the balance due being the basis of recovery in the assumpsit suit hereinbefore referred to, and that he on November 2, 1906, paid the note to Ira S. Powell for \$4,541.27 to the Hancock County National Bank upon which he was also surety. It follows that under either theory, the bill to foreclose was not prematurely filed as contended by appellants. The aggregate of said payments represents the amount for which the decree was rendered.

There is no merit in the contention that the note of Ira S. Powell to the Hancock County National Bank should not be held to be covered by the indemnity. The evidence shows that William A. Powell received the proceeds thereof and in such case it can be properly held that he is equitably liable therefor.

Under the foregoing views there was no valid defense to the assumpsit suit and the judgment therein entered for the balance due appellee on account of his payment of the Union National Bank note was proper.

The decree of foreclosure was warranted and is affirmed.

Affirmed.

**Robert W. Huey, Appellee, v. Ira S. Powell et al.,
Appellants.**

This case is controlled by the decision in Huey v. Powell, *ante*, p. 477.

Assumpsit. Appeal from the Circuit Court of Hancock county; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed December 23, 1908.

DAVID E. MACK, WILLIAM H. HARTZELL, JOHN W. WILLIAMS and JOHN D. MILLER, for appellants.

CHARLES J. SCOFIELD and APOLLOS W. O'HARBA, for appellee.

PER CURIAM: This is an appeal from a judgment in assumpsit in favor of appellee and against appellants.

The issues of fact and of law involved are fully detailed, discussed and determined in the opinion of this court in Huey v. Powell et al., *ante* p. 477.

In accordance with the views and conclusions there expressed the judgment of the circuit court in the assumpsit suit is affirmed.

Affirmed.

**Robert W. Huey, Appellee, v. Ira S. Powell et al.,
Appellants.**

This case is controlled by the decision in Huey v. Powell, *ante*, p. 477.

Bill for specific performance. Appeal from the Circuit Court of Hancock county; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed December 23, 1908.

Wullner v. Smith-Lohr Coal Co., 145 App. 486.

DAVID E. MACK, WILLIAM H. HARTZELL, JOHN W. WILLIAMS and JOHN D. MILLER, for appellants.

CHARLES J. SCOFIELD and APOLLOS W. O'HARRA, for appellee.

PER CURIAM: This is an appeal from a decree dismissing a bill for specific performance brought by appellant against appellee.

The issues of fact and of law involved are fully detailed, discussed and determined in the opinion of this court in Huey v. Powell et al., *ante* p. 477.

In accordance with the views and conclusions there expressed the decree of the circuit court will be affirmed.

Affirmed.

Theresa Wullner, Appellee, v. Smith-Lohr Coal Company, Appellant.

1. PLEADING—*when question of existence of declaration to support recovery waived.* By participating without objection in the trial upon the merits upon the issues formed, the non-existence of a declaration, because of demurrer sustained, cannot be urged on review.

2. TRIAL—*when conduct of counsel ground for reversal.* The conduct of counsel in bringing by indirection to the attention of the jury the fact that the defendant had been indemnified with respect to the pending action by an insurance company, is prejudicial and ground for new trial, notwithstanding the trial court by its rulings sought to prevent such fact being shown.

3. EVIDENCE—*when conclusions of experts invade province of jury.* After expert witnesses have given the basis for the foundation of the conclusion as to whether a particular room in a mine was safe or otherwise, it is not competent to permit such witnesses to state their opinion as to whether such room was safe or unsafe.

Action in case for death caused by alleged wrongful act. Appeal from the City Court of Pana; the Hon. JOSIAH P. HODGE, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed December 23, 1908.

J. C. and W. B. McBRIDE, for appellant; McQUIGG & DOWELL and MASTIN & SHERLOCK, of counsel.

J. W. PRIEHS, E. A. HUMPHREY and HOGAN & WALLACE, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action by Theresa Wullner to recover damages alleged to have been sustained by reason of the death of her husband, Antone Wullner, who, it is alleged, was killed in the coal mine of Smith-Lohr Coal Mining Company, by reason of the wilful violation by said company of certain provisions of the Miners Act. The issues were tried by jury and a verdict returned in favor of the plaintiff. Motions for a new trial and in arrest of judgment were interposed by the defendant and overruled, and judgment rendered upon the verdict for the sum of \$4,000, to reverse which this appeal is prosecuted by the defendant.

The first count of the declaration is predicated on section 18 of said statute, and after setting forth, practically in the language of the statute, the duties of the defendant under said section, avers that dangerous conditions existed in the room where decedent was required to work, by reason of the insufficient thickness of one of the pillars or ribs thereof, the same not being sufficient to support the weight resting thereon. The second count is also based on section 18 of said statute and charges that the room in which decedent was injured was dangerous by reason of the insufficiency of said pillar and that it was the duty of defendant not to allow decedent to work therein, except under the direction of the mine manager, while said room was in such unsafe condition, and that the defendant wilfully violated said duty. The third count is based on paragraph "a" of section 16 of said act, and sets forth the provisions of the statute and that it was the duty of the mine manager of defendant to in-

struct its employes who were engaged in the room where decedent was engaged and the room adjoining thereto with reference to their duties, and particularly with reference to the said pillar or rib, and also that it was the duty of defendant's mine manager to visit said rooms as often as practical, but that the defendant wilfully violated the provisions aforesaid, and that said mine manager suffered said pillar to be constructed in an unsafe and improper manner. The fourth count is based on paragraph "d" of section 16 of said act, and after the formal parts and after setting out the provisions of said clause, charges that it was the duty of defendant's mine manager to see that all dangerous places above and below in said mine were properly marked, and to display danger signals wherever they were required, and charges a wilful violation of said duty, and in each of said counts it is averred that as a direct result of the wilful violations which are charged, the decedent was killed.

At the close of all the evidence the court overruled a motion by the defendant to direct a verdict in its favor. During the progress of the trial appellee filed an amendment to her declaration. Appellant then filed a demurrer to the declaration as thus amended; whereupon appellee withdrew such amendment and the trial was continued as upon the original amended declaration. It is urged as error that inasmuch as the demurrer was broader than the amendment itself and went to the declaration in its entirety, the effect of sustaining the same was to eliminate the entire declaration, and that therefore no issues remained to be tried and determined. Having participated without objection in the trial of the issues formed by the various counts of the original amended declaration, appellant must be held to have thereby waived the alleged want of a declaration.

The evidence introduced by the plaintiff tended to show that on April 10, 1907, Antone Wullner, her husband and intestate, was engaged in mining coal in

room number 8 of the second south entry of the defendant's mine, which was being worked eastward and was at the time about 30 feet in width and about 180 feet in depth from the neck of the room to the face of the coal. Next to room 8 and separated therefrom by a pillar or partition of unmined coal was room 7. In driving the two rooms in the same direction the courses of the same had not been continued parallel, room 8 diverging north toward room 7, with the result that as the rooms progressed the pillar between them was gradually narrowed. About 60 feet from the necks of the rooms an air course had been cut through the intervening pillar. Beyond the air course the pillar had narrowed to a width of from 7 to 8 inches to 2 feet, and holes had been mined through in several places. On the previous day the center of the face of the coal in room 8 had been shot down by a "buster" shot. The coal on the south side of the opening thus created in the face of the coal had been removed, with the exception of some of the bottom coal, leaving a body of solid coal standing on the south side, extending eastward about 50 feet from the face. On the following day Haynes, Wullner's buddy, proceeded to drill holes therein preparatory to blasting the same. While he was so engaged, two large pieces of coal fell from the face of the solid coal near the center of the room, one of which struck Wullner and so injured him that he shortly thereafter died.

Several expert coal-miners testified that the effect of leaving insufficient pillars between rooms was to create what is called in mining parlance a "squeeze," which, by reason of the additional pressure placed upon the coal, had a tendency to cause it to become loose and fall; and further, that the usual width of pillars left in mines of this character is about 15 feet. There is evidence tending to show further that prior to the accident Wullner and Haynes had sounded the face of the coal and found no dangerous conditions there existing, and that on that morning prior

to the time the men entered the mine, the mine examiner had inspected the room and made his mark of the day and month of his visit on the face of the coal near the center, but found no unsafe condition. As the cause must be remanded for reasons hereinafter stated, we do not deem it necessary to further recite or discuss the evidence. It will suffice to say that there was evidence tending to support one or more counts of the declaration. The trial court therefore did not err in refusing to direct a verdict.

The witness Haynes, who was called in behalf of appellee, testified on the trial that Bogle, the superintendent, requested him to sign a certain paper. When asked to state what the paper contained the witness replied, "He told me that the insurance company required such a paper." The court refused upon motion of appellant to exclude such answer, whereupon counsel for appellee remarked that "Mr. Haynes stated that the witness had testified that the statement was for the benefit of an insurance company." Exception was taken to such remark but no ruling was made by the court. Counsel for appellee then asked the witness: "Did he say anything in that conversation about the insurance company?" to which question the court sustained an objection. These questions and the remark of counsel were doubtless intended to and probably did lead the jury to infer that an insurance company had indemnified appellant against the payment of damages in cases of this character. They were therefore prejudicial to appellant, and we are not satisfied that their harmful effect was wholly removed by the ruling of the court. *Emery v. DeHart*, 130 Ill. App. 244; *McCarthy v. Coal Co.*, 232 Ill. 473.

The court permitted several witnesses who were experienced coal miners to testify in substance that in their respective opinions the conditions surrounding the room in question at the time of the accident were such as to render it an unsafe place in which to work. The rulings of the court in this respect are assigned as

error. We are of opinion that with the aid of the competent testimony of such expert witnesses who were acquainted with the room in question and the immediate surroundings in the mine, the facts upon which the ultimate conclusions of such witnesses that the room was unsafe were predicated, were made intelligible to the court and jury. The conclusions of such witnesses that the conditions surrounding the room were unsafe were therefore incompetent. *Yarber v. C. & A. R. Co.*, 235 Ill. 589.

Other errors are assigned and argued which will doubtless be corrected upon another trial. For the reasons stated, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Mabel Hancock, Administratrix, Appellee, v. The Chicago, Burlington & Quincy Railroad Company, Appellant.

VERDICT—*effect of inspection by jury.* A jury cannot return a verdict upon their own knowledge unsupported by other evidence, whether such knowledge was acquired in or out of court, by a view or otherwise, and a verdict based exclusively on knowledge so acquired will be set aside for want of substantial evidence to support it.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Hancock county; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed December 23, 1908.

J. A. CONNELL, GEORGE EDMUNDS and DAVID E. MACK, for appellant.

WILLIAM H. HARTZELL, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case by which appellee seeks to recover damages resulting from the death of her husband and intestate, through the alleged negligence of appellant. Upon the trial of the cause the jury found the issues for the plaintiff and assessed her damages at \$3,000. Motions for a new trial and in arrest of judgment were overruled and judgment entered upon the verdict. The first count of the declaration charges that the deceased, Roy E. Hancock, was on August 23, 1907, in the employ of the defendant company as switchman in its switch yard at Galesburg, Illinois; that it was his duty to assist in making up and switching trains; that said switch yard contained numerous tracks for switching cars; that it was the duty of the defendant to furnish reasonably safe cars and appliances; that defendant in disregard of said duty caused to be switched in said yard by said Hancock a car the beams of which were rotten, defective and insufficient to hold the bumpers; that while Hancock was riding on the front of said car the same came against an engine with great force, and by reason of the defective beams on said car the bumpers were not sufficiently held to prevent the front end of the car from being smashed and jammed by said engine; and that by reason thereof the said Hancock was killed.

The second count charges that it was the duty of the defendant to keep its tracks in said switch yard free from obstructions and engines while cars were being handled in said yard; that the defendant suffered a certain switch engine to remain on one of its tracks; that while Hancock was riding on the front of a car which was being switched, the said car came in contact with said switch engine with great force, and by reason of defective bumpers on said car said bumpers were not sufficiently held to prevent the front end of said car from being jammed against said engine; by

reason of which Hancock was caught between said engine and car and killed.

The evidence tends to show the following facts: In August, 1907, the defendant company for the purpose of handling and operating its freight trains, maintained two sorting yards at Galesburg, Illinois, in each of which they ran a track upon an inclined plane from an elevation about 7 feet in height, called a hump. One of such tracks ran from a hump in the east yard into the west yard, and the other from a hump in the west yard into the east yard. The method of sorting and placing the cars from incoming freight trains was as follows: When a train arrived at the yards each car was examined in detail by two inspectors, to ascertain the condition of its various parts. It was then pushed to the top of one of the humps by a switch engine, where the place the same was to be set in the yard was determined and indicated. After the brakes on the car were tested the car was uncoupled from the switch engine and allowed to run by gravity from the hump down the track at an incline of about 7 feet in 10 car-lengths, and thence by means of switches thrown upon tracks running into various parts of the yards, to be there connected with outgoing trains. Such cars running down the incline were ridden by a brakeman called "the rider," whose duty it was to control the car by means of the brakes until it reached the car or cars to which it was to be attached. Prior to August 23, 1907, appellee's intestate, Roy Hancock, had been employed by the company as a switchman, and for several days prior to that date had been riding cars down the west hump into the west sorting yard. On the morning of that day two Arms Palace horse cars arrived at the yards, one of which was numbered 5008, and was constructed similar to a baggage car, having a platform and brake upon either end. Shortly after their arrival the cars were pushed to the top of the west hump, and with Hancock acting as rider, No. 5008 was released and allowed to run down the inclined

track. Upon such track at the distance of about 35 car-lengths from the hump, stood a switch engine attached to a train of loaded freight cars. When about seven car-lengths from the switch engine and train, the horse car had attained the speed of about 15 miles an hour. Hancock then for the first time endeavored to slacken the speed by the use of a brake, but was unable to do so, and his car collided with the switch engine with such force that the car and switch engine were badly damaged and Hancock was crushed between them and killed.

The evidence further discloses that at each end of the car in question, were two oak draft timbers 10 feet in length and 5 by 10 inches in diameter, which extended 28 inches beyond the body and sills of the car, and were fastened to the end beam and center sill of the car by bolts; that between the draft beams was a malleable iron draw-bar which weighed 160 pounds and projected about two inches beyond the platform. On top of the draft beams and fastened thereto by bolts to keep them from spreading, were two oak blocks. Resting transversely on top of these was the buffer beam which was mortised into the draft timbers and constituted the outside end of the platform of the car. Within the draw-bar pocket was a spring with a follower at either end between which the draw-bar operates, having a play of two inches. The testimony of expert witnesses developed that the impact of an approaching car would be received first by the draft timbers and that until the same had been broken off or displaced the beam across the end of the platform would not receive or be affected by the shock.

An inspection of the car in question after the collision disclosed that one of the draft timbers was broken off at the body of the car, and the other split off at the draw-bar pocket; the top platform beam was broken off, and the under one shoved up at the end. The king bolt by which the car was fastened upon the truck was broken and the draw-bar forced out of its

position between the draft timbers and had fallen down. The draw-bar of the switch engine was broken, and the head-light, window plate and boiler head badly damaged.

The testimony relied upon by counsel for appellee to establish the averments of the declaration as to the defective condition of the car, was the following: Elmer Duncan, a witness for appellee, testified in part as follows:

"I saw that car the next day after it happened. I went up and examined it (referring to platform). It was kind of doty looking timber. By doty timber I mean timber that isn't sound; timber that will kind of crumble in your fingers. I found that condition in those timbers one or two places. I just walked around and touched the timbers with my fingers and picked out some of the punk and rotten wood and crumbled it up in my fingers. It was in the timber next to me. The conditions I have noted were not in the timbers that support the bumper platform. They were in the cross-beam that holds the platform. The draw-bar sets between the two sills and this beam goes across the top of the bumpers. I think they are bolted to the bumper beams. The beam across the end is the one I refer to." On cross-examination: "The piece of wood I refer to as being defective is right across the end of the platform and underneath. I wouldn't swear that this is bolted to the draft timbers. I didn't examine to see if it was bolted or not. I didn't notice at that time where the draft timbers were. The platform was broken down partly. This timber I speak of was right across the end of the car. Part of the platform was standing up and part of it was down. I can't exactly tell which part was standing up. It was the part that was next to me as I was going toward the depot. The platform projected from the end of the car door in a manner similar to the way the end of the table projects from the table and this beam was across the end of the platform. Part of the

platform was broken off. The platform was not all there. I don't know how much of it was off. I do not think the pieces which projected out at the side of the car just before the steps come down were there. I don't know whether the draft timbers were there or not. I didn't examine the draft timbers. I just examined this one piece. I just crumbled a piece out of the end of the beam."

Nels Larson, a witness called by appellant, on cross-examination testified in part as follows: "I call those timbers sound. I call it sound (referring to the timber). You might call it a little rotten from water seeping. I saw the car repaired. I saw these timbers taken out; as to soundness these timbers were sound. I have experience in examining different kinds of timber. There was nothing broken in the car." (The witness then detailed the pieces that were broken and stated that there was nothing broken in the car, other than what he had mentioned.) "Now, in regard to the water sweeping through, and the timber affected by it, what we call the rises of the steps were over it. It was covered. There is nothing that covers the crack. There is a board goes over this place with three long screws and the water can seep in there behind the crack, and this little place you speak of that water seeped into was covered up. This is the only place of the kind that I noticed in the whole piece. I didn't consider it rotten at the place where the water seeped in."

Appellee produced upon the trial and offered in evidence the timbers which were claimed to be defective, and the same were inspected and examined by the jury.

Evidence was adduced by appellant which tended to show that the draft timbers in the car were placed there in June, 1905, and were at that time new and sound; that the car was carefully inspected at the shops of the horse car company at Chicago, on August 2, 1907, and thoroughly repaired; that on August 7th

following it was thoroughly and carefully inspected by employes of the appellant company at the Union Stock Yards at Chicago and found to be in good condition, and that a similar inspection was made upon the arrival of the cars at Galesburg on the morning of the accident, with like result. The foregoing evidence is manifestly insufficient to sustain the averments of the declaration that the beams of the car "were rotten, defective and insufficient to hold the bumps," or that "by reason of defective beams on said car the bumpers were not sufficiently held to prevent the front end of the car from being smashed and jammed by said engine and said car."

It is obvious that the timber described by the witnesses Duncan and Larson as being doty was the buffer beam which formed the front of the platform, which was not a part of the draft rigging and in no way supported the draw-bar or the draft timbers and would and could not receive the force of the impact of other cars until the coupling had been driven back twelve inches and broken entirely loose from the draft timbers and the front ends of the draft timbers demolished. This being so, the defects in the buffer beam could not have contributed to the accident. It is, however, insisted by counsel for appellee that because the jury saw the timbers which cannot be seen by this court, if anything is lacking in the evidence to sustain the verdict it must be presumed that it was supplied by such inspection. "It has never been held in this state that a jury might return a verdict upon their own knowledge, unsupported by other evidence, whether such knowledge was acquired in or out of court, by a view or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it." *Seavereus v. Lischinski*, 181 Ill. 358.

For the reason that the verdict was manifestly against the weight of the evidence, the judgment of the circuit court will be reversed and the cause remanded.

Reversed and remanded.

John Wiemer, Defendant in Error, v. George W. Temple, Plaintiff in Error.

1. REPLEVIN—*upon what recovery must be predicated.* A plaintiff in replevin can only recover upon the strength of his own title and the burden is upon him to establish his right.

2. INSTRUCTIONS—*must not ignore material issue.* An instruction which concludes with a direction to find a verdict one way or another, must not exclude from consideration any material issue of the case.

3. INSTRUCTIONS—*must be predicated upon the evidence.* Instructions are improper where their hypotheses are unsupported by evidence in the cause.

Replevin. Error to the County Court of McLean county; the Hon. ROLLAND A. RUSSELL, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 24, 1908.

MILES K. YOUNG and ED PEIRCE, for plaintiff in error.

HART & FLEMING, for defendant in error.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in replevin by John Wiemer against George W. Temple for the recovery of the possession of a lot of household goods and furniture, the title to which is claimed by Wiemer by virtue of a bill of sale from one Albert Henninger. A trial by jury resulted in a verdict and judgment in favor of Wiemer, whereupon Temple sued out this writ of error. The declaration charges the wrongful taking and detention of the property. The pleas upon which issue was joined were of property in the defendant in Albert Henninger and that the chattels were held by the defendant in pledge.

There is evidence tending to show the following facts: One William K. Bracken owned a house and lot in Normal, Illinois, which was subject to mortgages

aggregating \$3,250, together with certain household furniture used therein. The premises were occupied by Temple and were used as a boarding house under a contract with Bracken by the terms of which Temple was authorized if the opportunity arose to sell the property, both real and personal, for \$6,500. In the event of his being able to do so he was to receive as commissions the sum of \$300. Albert Henninger was a real estate broker and had in his hands for sale a farm of 120 acres in Mason county, Illinois, which he was authorized by the owner, George Henninger, his uncle, to sell at \$75 an acre, his commissions to be \$1 an acre. The farm was heavily encumbered by mortgages and George Henninger was otherwise indebted to practically the full value of the equity of redemption. Negotiations for the exchange of the two properties were begun between Albert Henninger and Temple acting for the respective owners. Such efforts were unsuccessful and arrangement was thereupon entered into between all the parties including Temple, whereby George Henninger was to deed his farm to Albert Henninger upon condition that Albert and Temple would furnish such sum as might be necessary to pay the unsecured indebtedness of George Henninger; that upon such conveyance the farm should be traded to Bracken for the Normal property and furnishings. Temple claimed that it was agreed between him and Albert Henninger that the property so acquired by them should be owned by them equally; that the title to the Normal real estate was to be conveyed to and held by Henninger, and that the title to and the possession of the furnishings should remain in Temple until such time as the entire property could be sold to advantage, when upon an accounting between them Temple was to be charged with one-half of the money advanced by Henninger in furtherance of the deal.

Henninger contends that no such agreement was made but that prior to the consummation of the trade

he made a conditional offer of sale to Temple of one-half interest in the property; that Temple had never accepted the same or made payment for such interest and that after having made repeated efforts to induce Temple to comply with such conditional sale, he sold the property to defendant in error. Be that as it may, the farm was thereafter conveyed to Albert Henninger who exchanged the same with Bracken for the city property. A bill of sale for the furnishings was made to Henninger and delivered to Temple who remained in possession of the property and continued to use the same in connection with the boarding house until the issuance of the writ herein. At the time when the deed and the bill of sale were delivered Temple, who was sick and unable to be present, wrote to Albert Henninger saying: "In regard to the Normal deal I will say that you had better send me a written statement as to my half interest in that property and after the deal is closed you can give me a deed to a half interest in the equity." In reply Henninger wrote a letter to Temple which was introduced in evidence as "Exhibit A" and reads as follows:

"MASON CITY, ILLINOIS, June 21, 1906.

GEORGE W. TEMPLE, Esq., Bloomington, Illinois,

DEAR SIR: I hereby acknowledge that you have an undivided one-half interest in the residence property situated at 306 West Ash Street, Normal, Illinois, and in the furnishings within said residence itemized in a certain bill of sale made to me by W. K. Bracken, that I shall execute a warranty deed to you at such time as a settlement is made of such amount as shall be due me in the acquiring of the property above. To fully protect you I shall have deed made out at once to be delivered to you in case of my death upon a proper accounting. Yours very truly, A. E. Henninger."

Some time thereafter a settlement was had between Bracken and Temple of their accounts, growing out of the joint operation of the boarding house, in which Bracken allowed Temple credit for \$100 upon a balance found to be due him from Temple. On December

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1, 1906, Henninger sold the premises and furnishings to Wiemer, the defendant in error. Temple refused to deliver possession either of the house or furnishings, whereupon Wiemer instituted the present action.

It will be seen that the issue as to the title and right to possession of the property replevied at the time of the issuance of the writ was the controlling one in the case, for under Temple's version of the contract he being at the time the owner of an undivided one-half of the property was a tenant in common with Henninger of the same and his possession was that of both, in which case replevin would not lie even at the suit of Henninger. Cobby on Replevin, sec. 231. It was essential under the pleadings that defendant in error should recover on the strength of his own title and the burden was upon him to establish his right. Pease v. Ditto, 189 Ill. 456. His title, if any, was derived solely from Henninger and was no better.

Conceding that the original agreement was as contended by Henninger, "Exhibit A" tended to show a waiver of the alleged condition that the title was not to pass until the consideration was paid. By the second and third of plaintiff's instructions the court told the jury that if they believed from the evidence that the terms of the contract were as insisted by Henninger before Temple could claim his goods under such contract it was necessary that he should have paid or tendered the consideration to Henninger, and unless they believed that he did so pay or tender the consideration, no title passed to him by virtue of said contract and their verdict should be for the plaintiff. Such instruction while directing a verdict ignored the question of waiver and was erroneous. By the 7th and 9th instructions the court further directed the jury that if Temple without the knowledge of Henninger received or was to receive either directly or indirectly any compensation from Bracken for services in the trade, then his claim on the property was illegal and invalid. Bracken testified that he told Temple that the contract

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between them for commissions did not apply to an exchange of the property and that he would pay no commissions and for Temple to get his compensation from the other party. He further testified that he gave Temple the credit for \$100 upon his account voluntarily and not as commissions; that Temple had lost money and was in debt to him by reason of having operated the boarding house, and that the credit was in the nature of a gift. Temple testified to the same effect and further that he did not expect any commissions from Bracken. Under the foregoing evidence the court was not warranted in giving the last mentioned instructions which doubtless misled the jury.

For the errors indicated the judgment of the circuit court must be reversed and the cause remanded.

Reversed and remanded.

Emeline Bacon et al., Appellees, v. The Peoria & Eastern Railway Company, Appellant.

1. AMENDMENTS AND JEOPAILS—*when granting leave after verdict not error.* Permitting an amendment after verdict and before judgment, by which a cause is discontinued as to one party, is not error if the original cause of action remains unchanged and the amendment is in furtherance of justice.

2. EVIDENCE—*when will incompetent to prove ownership.* A will devising particular property is not competent to prove ownership thereof in the beneficiaries in the absence of proof of probate.

Action on the case. Appeal from the Circuit Court of Tazewell county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908. Rehearing denied and opinion modified December 17, 1908.

GEORGE B. GILLESPIE, for appellant; L. J. HACKNEY, HAMLIN, GILLESPIE & FITZGERALD, and PRETTYMAN, VELDE & PRETTYMAN, of counsel.

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W. R. CURRAN and WM. A. POTTS, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This suit was originally instituted by Emeline Bacon, executrix of the last will and testament of Edward H. Bacon, deceased, against the Peoria & Eastern Railway Company, appellant, to recover damages occasioned by the alleged negligence of appellant or its lessee or licensee, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, in permitting sparks to escape from a locomotive whereby certain property consisting of a grain elevator, engine, machinery, scales and office was destroyed by fire. Before the trial the original plaintiff was permitted to amend the pleadings by making Emeline Bacon and Edward Harrison Bacon, by Emeline Bacon, his next friend, additional parties plaintiff. Thereafter the cause proceeded to verdict but before the rendition of judgment thereon the plaintiffs were permitted to discontinue the suit as to Emeline Bacon, executrix as aforesaid, and judgment was then entered upon the verdict in favor of Emeline Bacon and Edward Harrison Bacon, by Emeline Bacon his next friend, against appellant for \$2,250.

The declaration consists of the first original count and six additional counts which allege in varying phraseology the ownership and possession by appellees or by their tenant of certain described real estate together with the buildings, machinery, etc., situated thereon; that appellant, or its lessee or licensee was operating a certain locomotive engine upon the railroad located near said premises and that it became the duty of appellant and its lessee or licensee to provide said locomotive with the most approved appliances to prevent the escape of fire and to keep the same in suitable order and repair and to so use said locomotive that fire would not be liable to escape therefrom; that appellant, or its said lessee or

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licensee wholly failed to perform said duty and so negligently and carelessly operated said locomotive that sparks and brands of fire were thrown therefrom to and upon the said premises of appellees whereby the said buildings, machinery, etc., were destroyed.

That the fire which destroyed the elevator and property in question originated from a spark which was thrown from a locomotive of appellant, or of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company operating a train upon the railroad of appellant as its lessee or licensee, does not admit of any doubt under the evidence in this record. By a special verdict submitted at the instance of appellant the jury found that the spark arrester in the locomotive was defective and further found that the engineer and fireman who operated said engine were competent, but no special finding was made upon the issue as to whether or not said locomotive was operated with reasonable care and skill.

The finding of the jury that the spark arrester was defective is sustained not alone by the fact that the engine emitted unusual and considerable quantities of live sparks, but by the testimony of Charles A. Bromley, a witness called on behalf of appellant who inspected the engine on the night following the day upon which the fire occurred, to the effect that there were some small holes between the plates around the steam pipes and the smoke arch.

As to the manner in which the locomotive was operated the evidence tends to show that the effort of the engineer was more particularly directed in an attempt to make up lost time than to the reasonably careful operation of the engine with reference to emitting sparks therefrom.

The court did not err in permitting an amendment after verdict and before judgment whereby the suit was discontinued by Emeline Bacon, executrix of the last will and testament of Edward H. Bacon, deceased, as plaintiff. The original cause of action re-

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mained unchanged and the amendment was in the furtherance of justice.

To sustain their right to recover as owners of the property in question appellees introduced in evidence a paper purporting to be the last will and testament of Lilly Bacon, deceased, a daughter, by a former wife, of Edward H. Bacon, whereby the real estate upon which the property was located was devised to said Edward H. Bacon. Appellees offered no record of the probate of the said paper as the last will and testament of Lilly Bacon, and appellant interposed an objection to the introduction of said paper in evidence upon the ground that no proper foundation had been laid therefor. This objection was overruled and the paper was admitted in evidence. The objection was sufficiently specific and it was error to admit the paper in evidence over such objection without proper proof of its probate as the last will and testament of the alleged testatrix. *Hicks v. Deemer*, 187 Ill. 164.

Upon the back of the paper appears an endorsement in writing as follows: "This will duly proven, admitted to probate and recorded this 7th day of August, 1905, Jesse Black, Jr., Judge." Even if this endorsement constitutes proof of the probate of the instrument, it was not offered in evidence. For the error in the ruling of the court admitting the said paper in evidence the judgment must be reversed and the cause remanded for another trial.

Among other errors assigned by appellant is that relating to certain alleged insufficiencies in the proof as to the status of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company as the lessee or licensee of appellant, which was put in issue by the pleadings. Upon another trial appellees will doubtless be able to lay a proper foundation for the admission of secondary evidence as to the true status of said railway company and it is not necessary to prolong this opin-

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ion by further discussion of the assignment of error relating to that question.

The judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

William T. Haywood, Appellee, v. Dering Coal Company, Appellant.

1. EVIDENCE—*effect of sheriff's recitals upon return as independent evidence.* The recitals of service upon a summons are not substantive evidence in the cause. *Held*, in this case, that it was error to permit the summons and the return to be admitted in order to show operation of the mine in question by the defendant.

2. EVIDENCE—*when failure to report accident should not be shown.* Where not involved in the issues of the cause, it is error to permit the plaintiff to show that the defendant mine owner failed to report the accident in question to the state inspector having supervision of such mine.

3. EVIDENCE—*competency of X-ray photographs.* Upon a proper foundation being made, X-ray photographs are competent to show the extent of the injury.

4. EVIDENCE—*what part of res gesta.* Exclamations and declarations of pain made while under debris are competent as part of the *res gesta*.

5. INSTRUCTIONS—*when in language of statute should not be given.* An instruction is properly refused which incorporates only such parts of the statute as are favorable to the party asking it if it leaves out other portions of the same statute which may be favorable to the contention of the opposite party.

6. INSTRUCTIONS—*must not give undue prominence to particular evidence.* An instruction is improper which gives special and undue prominence to particular evidence.

7. VERDICT—*when excessive.* A verdict of \$2,500 rendered in an action for personal injuries is excessive, it appearing that the plaintiff as a result of the accident in question suffered intense pain in his back, legs and feet at the time of and for some time subsequent to his injury; that at the time of his injury he was earning \$4 a day; that he remained in bed six weeks and was only able to move his hand; that for about three weeks he was in a chair and after that was able to get around on crutches; that he

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used the crutches until warm weather; that on a certain day, some time after the accident, he was employed at the mine as a check weighman; that at the end of such day his back was very painful and his ankle was also painful and swollen; that he could not move as he did before the injury because of the pain, and that by reason of his injury the amount of his wages became less.

Action in case for personal injuries. Appeal from the Circuit Court of Montgomery county; the Hon. TRUMAN E. AMES, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

LANE, COOPER & MILLER, for appellant.

L. V. HILL and HOGAN & WALLACE, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by William T. Haywood, appellee, against the Dering Coal Co., appellant, to recover damages for personal injuries alleged to have been sustained by reason of the wilful violation by appellant of certain provisions of the Mines and Miners Act. Upon a trial by jury there was a verdict and judgment against appellant for \$2,500. The case was submitted to the jury upon two counts of the declaration. The first count charges, in substance, that the mine examiner of appellant wilfully failed to visit the mine before the men were permitted to enter to work therein, and wilfully failed to inspect all places where men were expected to pass or to work, and to observe whether there were any unsafe conditions in the rooms or roadways in the mine, and wilfully failed to inscribe with chalk on the walls of the working place of appellee or the roadways in said mine, the month and day of the month of his visit, and wilfully failed to place a conspicuous mark at the entrance of all roadways or working places, where dangerous conditions existed, as notice to all men to keep out, and wilfully failed to report his finding to the mine manager; and that appellant wilfully permitted appellee to enter

said mine to work, not under the direction of the mine manager, at a time when unsafe conditions existed therein; and that the mine examiner wilfully failed to make a detailed record of the condition of the mine as he found it in a book kept for that purpose, as provided in Section 18 of the Mines and Miners Act. The second count charges the mine manager of appellant with a wilful failure to see that all dangerous places above and below were properly marked, and with a wilful failure to see that danger signals were displayed where required. To the declaration appellant pleaded the general issue and also filed a special plea, averring that appellee was not in its employ as a coal miner or in any other capacity at the time of his alleged injury; that appellant did not then own, operate and possess the coal mine described in the declaration, and that it was not then engaged in mining and removing coal from said mine. The record does not disclose that appellee joined issue upon the special plea.

On September 18, 1906, and for about two years and a half prior thereto, appellee was employed as a coal miner in a coal mine known as Mine No. 24 located at Witt, in Montgomery county. At half past six o'clock on the morning of that day he entered the mine for the purpose of resuming his work, in driving the entry at the face of the sixth east entry on the north side, and while he was walking along said entry, and at a point near a coal car upon the track in said entry, loose rock and slate in the roof of the entry fell upon him causing the injuries complained of. The evidence tends to show that no conspicuous marks were then placed at the entrance of said entry to indicate that any dangerous condition existed therein. The evidence further tends to show that at or near the place where appellee was injured a cross-cut had been driven a distance of about seventeen feet toward the fifth east entry, which entry had not then been extended up to that point. The evidence further tends to show that

there were no marks either on the walls or on the roof of the entry at the place where appellee was injured, indicating that the mine examiner had inspected that portion of the entry or that any dangerous or unsafe conditions existed there. It is uncontroverted that the roof of the entry at the place in question was unsafe and dangerous and was not supported by props or cross-bars.

It is insisted on behalf of appellant that the place where appellee was injured was his working place and that as appellee had been directed some time previous to his injury to prop the roof of his working place, and as conspicuous marks indicating dangerous conditions in the roof had then been placed by the mine examiner, appellant is not liable. The evidence tends to show that the working place of a miner extends from the face of the coal to the rear of the car when in position to be loaded, or a distance of sixteen to seventeen feet from the face of the coal. The evidence further tends to show that when men are engaged in driving an entry and a cross-cut at the same time they usually work in both places alternately, and that under such conditions the working place of the men includes the face of the entry and the cross-cut and the space between the face of the entry and the cross-cut. The contention of appellant in this respect is predicated wholly upon the fact that appellee was injured at the place where his car was standing, immediately opposite the cross-cut which had previously been driven by appellee and his buddy. The evidence, however, tends to show that the car was then standing forty or fifty feet from the face of the entry which appellee was engaged in driving, and that appellee and his buddy had completed their work in the cross-cut about a week previous to the day appellee was injured. The evidence further tends to show that the props which miners are required to set to support the roof of their working place are only intended to serve a temporary purpose while the work is being prosecuted, and that

thereafter the duty of setting props and cross pieces for the purpose of permanently supporting the roof of an entry, as a road-way or passage-way in the mine, devolves upon the mine operator.

We think the jury were justified in finding that the place where appellee was injured was not his working place and that the mine operator had wilfully failed to comply with the provisions of the statute in the particulars alleged in the declaration.

The evidence bearing upon the question as to whether or not appellant was operating the mine in which appellee was injured is conflicting, and we should not be disposed to interfere with the verdict upon that issue if the court had not admitted incompetent evidence offered by appellee over the objection of appellant.

The summons in the case and the return of the sheriff thereon, showing that the same had been served upon appellant, did not in the least tend to show that appellant was in possession of the mine in question, and the admission of the summons and return in evidence could not have been otherwise than prejudicial to appellant. Whether or not Edward Bottomlee was the superintendent in the employ of appellant, or of the Burnwell Coal Company, was a controverted issue affecting the question whether the mine was operated by appellant or by said Burnwell Coal Company. The return of the sheriff that he had served the writ upon appellant by reading the same to Edward Bottomlee, superintendent of appellant, and at the same time delivering to him a true copy of said writ, amounted to nothing less than an *ex parte* unsworn statement by the sheriff of the county in his official capacity, that Bottomlee was the superintendent of the mine in the employ of appellant.

The witness W. W. Williams, a state mine inspector, called on behalf of appellee, was permitted to testify over the objection of appellant, that the company operating the mine at the time appellee was injured had

made no report of such injury to him. The evidence of this witness in that regard was foreign to any issue in the case, and its admission, taken in connection with the statement by one of the counsel for appellee, that it tended to show a disposition on the part of appellant to conceal the accident and what occasioned it, we think was harmful to appellant.

The court did not err in admitting in evidence the X-ray photographs of the bones of appellee's foot after his injury and of the foot of a person showing the normal position of similar bones. The proper foundation was laid for the admission of such evidence within the rule announced in *Chicago City Ry. Co. v. Smith*, 226 Ill. 178.

Exclamations and declarations made by appellee while he was under the fallen rock and slate relative to his pain and suffering and his situation there, were properly admitted in evidence as a part of the *res gesta*. *Springfield Ry. Co. v. Hoeffner*, 175 Ill. 634; *Muren Coal & Ice Co. v. Howell*, 217 Ill. 190.

The several exhibits consisting of pay slips and envelopes tending to show that the mine in question was operated by appellant were properly admitted in evidence, so far as they related to the mine in question known as Mine No. 24, and so far as they related to transactions at or about the time appellee was injured, but such of the exhibits as related to transactions connected with the operation of the mine known as Mine No. 22, and so far as such exhibits related to transactions with the mine in question long subsequent to the injury to appellee, were improperly admitted in evidence.

Appellee's first instruction as offered and given is wholly inconsistent with appellee's contention that he was injured in a place other than his working place, where no duty devolved upon him to prop the roof. This is the contention most strongly urged by appellee in this court in support of his right to a recovery. The instruction as offered and given was not tanta-

mount to an instruction authorizing a verdict for appellee upon proof of the allegations of his declaration, because it recited only a portion of the section of the statute, the wilful violation of which was alleged in the declaration.

While it has been held not to be error to give an instruction in the language of the statute (*Reisch v. The People*, 229 Ill. 574), we know of no authority which justifies a party in incorporating in an instruction only such portions of the statute as are conceived to be favorable to his contention, and excluding other portions of the same statute which may be favorable to the contention of the opposite party. We perceive no fault in appellee's second instruction. As we understand the law, the duty devolving upon a mine operator not to permit persons to enter the mine to work therein, except under the direction of the mine manager, until all known dangerous conditions shall have been made safe, relates to such dangerous conditions existing as well in the miner's working place as elsewhere.

The fourth instruction given at the instance of appellee singles out and gives undue prominence to certain evidence offered by appellee bearing upon the issue as to whether or not appellant operated the mine in question.

Appellee's fifth instruction omits the requirement that the wilful failure of appellant to observe the provisions of the statute, as alleged in the declaration, must be shown to have been the proximate cause of his injury. Appellee's sixth instruction sufficiently advised the jury what constituted a wilful violation of the provisions of the statutes, within the meaning of the law, and it was unnecessary to give appellee's eighth instruction in abstract form relating to the same subject.

The damages resulting from an injury caused by the wilful failure of a mine operator to comply with the provisions of the statute are limited to the direct pecu-

niary damages sustained. The ninth instruction does not accurately advise the jury as to their province in determining the amount of damages to be awarded to appellee. Appellee's tenth instruction states the rule in that regard more accurately, although it directs the attention of the jury to some elements of damage not shown by the evidence. The third instruction as offered by appellant was as follows:

"The court instructs the jury that if you believe from the evidence, in this case, that the Burnwell Coal Company was the owner of and in the possession of and operating the coal mine in question on the 18th day of September, 1906, then you must find the defendant not guilty."

This instruction the court modified by inserting the words "a preponderance of" after the word "from" and before the word "the", and gave it to the jury as so modified. It is urged in criticism of this instruction as modified by the court, that it changed the burden of proof and cast it upon the appellant, when, under the issues, the burden of proving that the mine in question was operated by appellant was upon appellee.

A majority of the court, the writer not concurring, are of the opinion that the instruction was improperly modified. The writer is of the opinion that by the instruction as offered, appellant assumed the burden of proof upon that issue, and that the modification by the court affected no change in the instruction in that regard; that by the instruction as offered the jury was called upon to weigh the evidence in determining that issue and that the phraseology of the instruction as offered cast the burden of proof upon the appellant. In *C. & E. I. R. R. Co. v. Cleminger*, 77 Ill. App. 186, it was held that an objection to an instruction which used the word "evidence" instead of the term "preponderance of evidence" was fanciful rather than substantial. If the instruction had advised the jury that the burden of proving that appellant was operating the

coal mine in question was upon appellee, and that if appellee had failed to establish that fact by a preponderance of the evidence, they should find appellant not guilty, it would, in the opinion of the writer, have more properly expressed the intention of counsel for appellant when the instruction was drafted.

It is lastly urged that the damages awarded to appellee are excessive. Appellee testified that he suffered intense pain in his back, legs and feet at the time of and for some time subsequent to his injury; that at the time of his injury he was earning \$4 a day; that he remained in bed six weeks and was only able to move his hands; that for about three weeks he was in a chair and after that was able to get around on crutches; that he used the crutches until warm weather; that on December 22, 1906, he was employed at the mine as a check weigh man; that at the end of the day his back is very painful and his ankle is also very painful and swollen; that he could not move as he did before the injury because of the pain. Dr. Lockhart, the physician who attended appellee, testified that when he was called to see appellee he examined him and found that his back was sprained and his left ankle was fractured in the joint; that the pain in appellee's back was rather severe, but he did not complain of much pain in his ankle; that there was nothing noticeable in the way of injuries in his back; that at first for about a week he visited appellee twice a day and after that not so often; that he thought the injury occasioned pain for about a week or so; that he never examined appellee's back since he discontinued his visits; that he saw appellee's ankle in the spring or summer of 1907, and found nothing the matter with it, except that it was stiff; that he was inclined to think the stiffness of the ankle would be permanent, but was not sure; that he found no evidence external or otherwise of injury to the back; that there was no shortening of the foot or leg, and that the fractured parts had all united. It further appears

from the evidence that since appellee commenced work as a check weigh man he has earned about \$3.60 a day. A careful consideration of the evidence bearing upon the question of appellee's injuries impels us to the conclusion that the sum of \$2,500, awarded to him as damages for such injuries, is excessive. There is no evidence in the record that appellee paid, or that he became liable to pay, anything for medical attendance or nursing. For the reasons stated the judgment of the circuit court will be reversed and the cause remanded. The cost of the additional abstract furnished by appellee will be taxed against appellant.

Reversed and remanded.

A. T. Shadle, Appellant, v. Charles G. Wolf, Appellee.

1. **PLEADING**—*what determines whether plea is in abatement or in bar.* Whether a plea is in abatement or in bar is to be determined not from the subject-matter of the plea but from its conclusion. The advantage of relief sought by the plea determines its character.

2. **PLEADING**—*when plea sets up matter in abatement.* A plea which does not dispute the justness of the plaintiff's claim but which sets up matter which necessarily operates as an objection to the mode of asserting such claim, and the judgment entered is one which leaves the plaintiff to renew his action in another form, is a plea not in bar but in abatement.

3. **PLEADING**—*conclusion of plea in abatement.* The proper conclusion of a plea in abatement is that the writ and the declaration be quashed.

Assumpsit. Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

A. E. CAMPBELL, for appellant.

H. LEONARD JONES, for appellee.

Shadle v. Wolf, 145 App. 515.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit in assumpsit to recover the amount of a promissory note for \$180 with interest thereon. The declaration consists of the common counts and one special count which avers that defendant on July 25, 1900, gave his certain promissory note for \$180 to the City Bank of Ogden, Iowa, and that plaintiff, at the request of defendant, became surety thereon; that afterwards, on July 25, 1901, the said note having become due, plaintiff paid the same. To this declaration defendant filed his plea averring that prior to the filing of the declaration and prior to the maturity of said note, to wit, on February 15, 1901, the plaintiff and defendant were partners carrying on a certain business in the county of Boone in the State of Iowa, and as such partners were the owners of certain machinery and other property used in conducting the partnership business; that on the day last aforesaid the plaintiff and defendant agreed to dissolve said partnership and that the same should be dissolved upon the liquidation of the partnership affairs; that as to the manner of said liquidation it was agreed that the plaintiff should take all of the partnership property and collect all accounts due the firm; that out of the proceeds of said partnership he should pay all partnership debts, including the note described in the declaration, and that after the sale of the partnership property, the collection of partnership accounts and the payment of partnership debts, including the payment of said note, he should pay the defendant for his interest in the partnership property one-half of the amount remaining. The plea further avers that since said agreement was made the plaintiff has collected more than enough of said partnership accounts, and sold more than enough of said partnership property, and received as the proceeds thereof more than enough money to satisfy all the partnership indebtedness, including the payment of the said note, and now has in his control and posses-

sion a considerable sum of money, one-half of which sum of money the defendant is entitled to under said agreement; that since the making of said agreement the plaintiff has not made or had any accounting with the defendant concerning the said money and proceeds, and refuses to make or have any accounting thereof with the defendant. The plea concludes with a verification and prays judgment of the said declaration and that the same may be quashed. To this plea a demurrer interposed by plaintiff was overruled by the court and leave given plaintiff to reply. Thereafter leave to plaintiff to reply was set aside and judgment was entered on the demurrer to said plea, and it was ordered that the writ be quashed and the suit be dismissed at the costs of the plaintiff.

Waiving the question as to whether or not, upon the record in the case, the plaintiff can be said to have abided his demurrer so as to have the judgment of the court thereon reviewed, upon a consideration of the merits of the controversy here urged we are of opinion that the plea in question is in form and substance a plea in abatement; that the demurrer thereto was properly overruled and that the judgment as entered conforms substantially with the proper practice in such cases.

Whether a plea is in abatement or in bar is to be determined, not from the subject-matter of the plea, but from its conclusion. The advantage or relief sought by the plea determines its character. *Pitts Sons' Man'f Co. v. Commercial Nat. Bank*, 121 Ill. 582.

The matters alleged in the plea here involved disclose an unsettled partnership account between the parties and the existing agreement upon the part of plaintiff to pay the note in question, not by virtue of his liability as surety, but as a partnership transaction and out of the proceeds of partnership property. The remedy, therefore, available to either party is in a court of equity. *Burns v. Nottingham*, 60 Ill. 531;

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Newman v. Tichenor, 88 Ill. App. 1. The plea does not dispute the justness of the plaintiff's claim, but sets up matter which necessarily operates as an objection to the mode of asserting such claim, and the judgment entered leaves the plaintiff to renew his action in another form. These are among the characteristics which distinguish the plea in question as a plea in abatement from a plea in bar.

The generally prescribed form of conclusion in a plea in abatement in actions similar to the one at bar is that the writ and the declaration be quashed. The plea here involved concludes with a prayer for judgment of the declaration and that the same be quashed. We do not regard the departure in the respect indicated of sufficient importance to affect the substantial character of the plea as a plea in abatement.

The demurrer to the plea was properly overruled and the judgment of the Circuit Court will be affirmed.

Affirmed.

Rebecca Milligan, Appellee, v. E. R. Darlington Lumber Company, Appellant.

1. LANDLORD AND TENANT—*when partnership accepts lease.* The conduct of a partnership under and by virtue of the provisions of a lease constitutes an acceptance by such partnership of the lease and such partnership becomes bound by the provisions thereof notwithstanding it has not signed the same.

2. LANDLORD AND TENANT—*character of provision of assignment without former's consent.* A provision in a lease that the same shall not be assigned without the written consent of the lessor is a provision for the benefit of the lessor only and the failure of the parties to obtain such consent does not render the assignment void.

3. LANDLORD AND TENANT—*when latter obligated to pay special assessments.* A lease providing that the tenant shall pay all taxes and "assessments" obligates such tenant to pay special assessments.

4. LOCAL IMPROVEMENTS—*when proceeding not subject to collat-*

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eral attack. A proceeding to levy a special assessment cannot be attacked in an action by the owner of the property assessed against his tenant to compel such tenant to pay an assessment which he has assumed by the lease to pay.

Assumpsit. Appeal from the Circuit Court of Christian county; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

J. C. & W. B. McBRIDE, for appellant.

HOGAN & WALLACE, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

On February 1, 1902, appellee, being the owner of lot 7 in block 16 in the City of Taylorville, executed a written lease of said premises to E. R. Darlington & Co. for the term of five years "for the purpose of carrying on the business of a lumber yard." The lease provided that the lessees should pay to appellee as rent for said premises the sum of \$75 annually and "all taxes and assessments that may be levied and assessed on said premises for the year 1902 and all subsequent years of the term, until they shall have paid the taxes and assessments thereon for five years, and that they will each year of the term and by the 15th day of March of each year of the term deliver to the said party of the first part at her residence in Taylorville, Illinois, a proper receipt or receipts for the taxes and assessments levied on said premises for the preceding rental year." The several members of the copartnership, named as lessees in the lease, were non-residents of the state and did not sign the lease, but the same was signed upon their behalf by one Hagener, the local agent and manager for said co-partnership at Taylorville. From the date of the execution of the lease until some time in 1904, the co-partnership occupied the leased premises under said lease, and paid as rent therefor \$75 annually, and the general taxes levied against the same. In 1904

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the members of said co-partnership became incorporated as the Darlington Lumber Co., which thereafter continued to occupy the leased premises as the successor or assignee of said partnership, and paid to appellee as rent for said premises the sum of \$75 per year and the general taxes levied thereon. In 1903 the city council of the city of Taylorville passed an ordinance providing for the paving of certain streets abutting upon the leased premises, and for the cost of such improvement to be paid for by special taxation levied upon the property abutting said streets. In pursuance of such ordinance the improvement provided for thereby was made and such further proceedings were had whereby a judgment of confirmation was entered by the county court for the amount of special tax assessed against the leased premises, and a levy was made for the payment thereof in installments. Appellant refused to pay any of the installments of the special tax so levied against the premises and appellee having paid the installments payable in 1904 and 1905, together with certain penalties and costs accrued thereon, brought this suit against Evans R. Darlington, James G. Berryhill and Samuel Berryhill, partners, doing business as E. R. Darlington & Company, and the E. R. Darlington Lumber Co., a corporation, to recover the amount so paid by her. Service was had upon the corporation only, and a trial of the cause by the court without a jury resulted in a finding and judgment against said corporation, appellant here, for \$258.72.

It is not necessary to determine whether Hagener, the local agent and manager of E. R. Darlington & Co., had either express or implied authority to execute the lease for said partnership as a party thereto. It is uncontroverted that the partnership of E. R. Darlington & Co. entered into possession of the premises under and by virtue of the lease in question, and that said partnership paid the sum of \$75 per year and the general taxes levied against the leased premises

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as rent therefor, during the time it occupied the same and until the appellant corporation was organized. The liability to pay the general taxes levied against the leased premises as rent therefor could only arise under and by virtue of the lease, and the payment of the taxes by the partnership is sufficient to show knowledge on its part of the provisions of the lease. The conduct of the partnership under and by virtue of the provisions of the lease constituted an acceptance by said partnership of the lease, and it became bound by the provisions thereof notwithstanding the fact that it had not signed the instrument. *McFarlane v. Williams*, 107 Ill. 33; *Henderson v. Virden Coal Co.*, 78 Ill. App. 437.

The provision in the lease that the same should not be assigned without the written consent of the lessor is a provision for the benefit of the lessor only and the failure of the parties to obtain such consent did not render the assignment from the partnership to the corporation void. *Webster v. Nichols*, 104 Ill. 160; *Livingston County Telephone Co. v. Herzberg*, 118 Ill. App. 599. The obligation of the appellant corporation to comply with the provisions of the lease rests upon the same foundation as does the liability of the partnership, viz., acceptance of the lease and payment of rent thereunder to appellee.

It must be conceded that if the lease in question merely provided that the lessee should pay the taxes assessed and levied against the leased premises such provision would not create a liability upon the part of the lessee to pay any special assessments or special taxes assessed and levied against said premises. *I. C. R. R. Co. v. City of Decatur*, 126 Ill. 92; *DeClercq v. Barber Paving Co.*, 167 Ill. 215. In the cases cited it was held that there is a clear distinction between a tax and a special assessment; that a tax is imposed for a general or public governmental purpose and lessens the value of the property against which it is made a charge, while a special assessment is levied for a spe-

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cial purpose involving the improvement of the property against which it is levied and thereby adding to its value; that an exemption from taxation did not constitute an exemption from special assessments, and that an obligation to pay the taxes levied against certain premises did not create an obligation to pay special assessments levied against the same. By the terms of the lease here involved the lessee agreed to pay all taxes and assessments which might be levied and assessed on the premises during the term of the lease. The word "assessments" as used in the lease, whether it be given its plain, ordinary and popular meaning or its technical meaning, as a legal term, must be held to include all charges which might be imposed upon the premises by special assessment or special taxation for purposes of local improvements in contradistinction to burdens imposed upon the premises for governmental purposes by general taxation, as expressed by the word "taxes." *Stephani v. Cath. Bish.*, 2 Ill. App. 249. The use of both words in the lease clearly indicates that it was within the contemplation of the parties that the lessee should pay all charges which might be imposed upon the premises for either of the purposes indicated.

It is finally urged on behalf of appellant that the ordinance under which the special tax here sought to be collected was levied was defective in that it did not fix the grade for the improvement, and that if appellee had filed objection to the confirmation of the special tax upon that ground such obligation would have been sustained and the payment thereof avoided. It is a sufficient answer to this contention to say that the regularity of the proceedings whereby the assessment was confirmed and judgment of sale was rendered is not open to collateral attack in this suit.

The rulings of the trial court upon the propositions submitted to be held as the law applicable to the case were in accordance with the views here expressed and the judgment will be affirmed.

Affirmed.

**H. C. Kennedy, Plaintiff in Error, v. Town of Normal
et al., Defendants in Error.**

1. **MANDAMUS**—*when lies*. The remedy by *mandamus* can only be invoked where the relator sets forth and establishes the right to coerce the respondent to do the thing sought to be done.

2. **MANDAMUS**—*when not awarded to compel municipality to pay salary*. Unless the right to the salary sought to be collected by *mandamus* is clear, the right to the remedy will be denied.

Mandamus. Error to the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

BRACKEN, YOUNG & PIERCE, for plaintiff in error.

R. L. FLEMING, for defendants in error; HARVEY HART, of counsel.

MR. JUSTICE BAUME delivered the opinion of the court.

Plaintiff in error on March 11 and March 30, 1908, filed his original and amended petition for *mandamus* in the Circuit Court of McLean county against the town of Normal and the president, clerk, and treasurer of said town, defendants in error, to compel the payment of an alleged balance due him for salary as street commissioner of said town, for the term beginning April 1, 1907, and ending April 1, 1908.

The petition alleges that the town of Normal is a municipal corporation organized under the laws of the state and a certain special charter granted to it by the state on February 25, 1867; that on March 18, 1905, the town council of said town enacted an ordinance known as Ordinance VIII, section 1 of which ordinance provided that at the first regular meeting of the town council after the regular annual election the said town council should appoint various town officers, including a street commissioner, which officers should hold their respective offices for a term of one year and

until their successors were appointed and qualified, and that they might be removed from office for any good cause shown; that by the several sections of said ordinance it was provided that the compensation to be received by said officers should be fixed annually prior to their appointment; that it should be the duty of the street commissioner, under and by direction of the town council, to keep the streets, alleys, sidewalks and crossings in good repair, to keep the streets clean from rubbish and obstruction, and to do all other acts in relation thereto required by the said council, and that it should be the duty of the town treasurer to collect and receive all moneys belonging to the town and to pay over to the proper parties money on all orders signed by the president and town clerk; that by a public record of its proceedings then made and entered in said town council on April 1, 1907, it appointed plaintiff in error street commissioner of said town and fixed his salary at \$2 per day; that plaintiff in error accepted said appointment and qualified and entered upon the performance of the duties of said office; that he has been paid on account of his salary as such officer the sum of \$297.60, and that all the balance of his salary for such portion of his term of office as had expired remained due and unpaid; that after the payment to him of \$142 on account of his salary the said town council on July 1, 1907, enacted an appropriation ordinance which included an apportionment of \$600 for the salary of the street commissioner.

The petition further alleges the duty of the president, clerk and treasurer of the said town in the premises, a demand by plaintiff in error, a refusal by the defendants in error, and that at the time of said demand and refusal there was ample funds in the hands of the treasurer of said town appropriated for the salary of street commissioner to meet said demand. The defendants in error filed their joint and several answer to the petition, wherein they deny that the salary of plaintiff in error was fixed at \$2 per day for each

and every day in the year, and aver that said salary was fixed at \$2 per day for each and every day that the plaintiff in error should be employed in and about the duties of his office. The answer avers that at the first regular meeting of the town council held in each of the months of May, June, July, August, September and October, 1907, plaintiff in error presented to said council a written bill for services as street commissioner for the preceding month, which several bills were paid as presented and such payment was accepted by him as in full for all services during each of the said several months; that said bills as so presented included services during each of said several months as follows: April, 24-2/5 secular days; May, 22 days and 2 hours; June, 24 days and 2 hours; July, 26 days; August, 26 1/2 days, and September, 25 1/2 days; that for each of said months plaintiff in error made no claim for any services on Sunday, except for one-half day in September, as to which he especially reported that he had performed necessary services; that by so presenting his bills and accepting payment in accordance therewith plaintiff in error thereby construed the order fixing his salary as following: \$2 per day for such days as he should be engaged in performing the duties of his office, and that by so presenting his bills and accepting payment in accordance therewith, plaintiff in error was estopped from setting up any claim for additional services up to October 1, 1907; that at the regular meeting in November plaintiff in error presented his bill for services for all of the working days in the month of October, when as a matter of fact he had been engaged only one-half of said days in performing his duties, and for that reason the committee of the town council refused to recommend the payment of said bill in full, but recommended the payment of only so much thereof as represented the days upon which plaintiff in error had actually performed any duty; that at the regular meeting in December, 1907, plaintiff in error presented his bill for salary for

thirty-one days in October and thirty days in November, which bill the town council declined to approve because plaintiff in error performed no services on any of four Sundays in each of said months and because he was only engaged thirteen days in performing services during the month of October, but said council was ready and willing and offered to pay plaintiff in error his salary for all of the days he was actually employed during said months. The answer further avers that plaintiff in error was not then and had not been street commissioner of said town since December 9, 1907, upon which day the plaintiff in error notified said town council in writing that all orders or commands from the council or its members to him should be in writing signed by them and delivered to the clerk and that thereby plaintiff in error declined to further discharge the duties of street commissioner as required by law, and thereafter ceased to be entitled to any salary as such street commissioner; that at the regular meeting of the said town council held December 16, 1907, the committee on streets and alleys presented its report upon the conduct of plaintiff in error, wherein said committee recited the conduct of plaintiff in error in presenting his bill for services as theretofore stated, and in giving the written notice referred to, and adjudged that such conduct of plaintiff in error was good cause for his removal from office; and that by a resolution then adopted by the town council plaintiff in error was removed from office for good cause shown.

A demurrer interposed by plaintiff in error to said answer was sustained by the court and plaintiff in error abiding his demurrer judgment was rendered against him in bar of his action and for costs.

It is elementary that the remedy by *mandamus* can only be invoked where the relator sets forth and establishes a clear right to coerce the respondent to do the thing which the relator seeks to have done. In *The People v. Rose*, 225 Ill. 496, it was said: "The writ

of *mandamus* has always been regarded as one of the highest writs known to our system of jurisprudence, and it only issues where there is a clear legal right to be enforced or a duty which ought to be performed. It is never issued in doubtful cases. (People v. Salomon, 46 Ill. 415; People v. Trustees of Schools, 86 id. 613; People v. Town of Old Town, 88 id. 202.)

“The award of this writ even in cases where the relator has an undoubted legal right, is in the wise judicial discretion of the court.”

In the People v. Getzendaner, 137 Ill. 234, the court quotes approvingly from High on Extraordinary Remedies, as follows: “It is not the province of *mandamus* to settle the differences of opinion between municipal authorities and claimants as to the amount due for services rendered. All such cases of disputed accounts or claims against the municipality should be referred to the arbitrament of a jury or to the ordinary process of the courts; and they cannot be determined by proceedings in *mandamus*.”

The order of the town council fixing the salary of plaintiff in error at \$2 per day is not necessarily to be construed as entitling plaintiff in error to \$2 for each and every day in the year, and considering the fact that the amount appropriated to cover the salary of the street commissioner for the entire year was only \$600, and considering also the conduct of plaintiff in error in presenting bills for his services which covered only as many days in each month as he was actually engaged in the performance of his duties, we think, to say the least, that the right of plaintiff in error to a judgment awarding a peremptory writ of *mandamus* as prayed in his petition, is very doubtful, and that the trial court did not err in overruling the demurrer to the answer to the petition. The denial of the writ was not a clear abuse of judicial discretion. Accordingly the judgment of the Circuit Court will be affirmed.

Affirmed.

Vindas v. Dering Coal Co., 145 App. 528.

Peter Vindas, Appellee, v. Dering Coal Company, Appellant.

1. **MINES AND MINERS**—*what wilful violation to comply with demand for timbers.* Where a mine operator adopts an exclusive method whereby a miner is required to make his demands for necessary timbers, it must be held that a compliance by the miner with such method constitutes a demand for such timbers within the meaning of the statute, and that a failure on the part of the mine operator to comply with a demand so made constitutes a wilful failure within the meaning of the statute.

2. **VERDICT**—*when not excessive.* A verdict for \$466.66 rendered in an action for personal injuries is not excessive where it appears that as a result of the accident in question the right ankle of the plaintiff was severely sprained, that he suffered considerable pain for a long time thereafter, that he was confined to his house for a month and was not able to resume his work for about six weeks after the injury, that at the time of his injury he was earning from \$70 to \$90 per month and that after he resumed work he was earning but \$40 to \$60 per month.

Action in case for personal injuries. Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1908. **Affirmed.** Opinion filed November 17, 1908.

BUCKINGHAM & TROUP, for appellant.

C. H. BECKWITH and S. M. CLARK, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant for \$466.66 as damages for personal injuries alleged to have been sustained by reason of the wilful failure of appellant to furnish a sufficient supply of timbers, when demanded, for the purpose of securing the roof of the room neck where appellee was employed as a miner, whereby loose rock fell from the roof of said room neck upon his foot and ankle.

The evidence discloses that the miners employed in appellant's coal mine were required to deposit in a box

provided by appellant slips of paper upon which were designated the character, length and dimensions of timbers required by the miners to properly prop and secure the roof of their working place, and that no other provision was made by appellant whereby the demands of the miners in that regard might be made and supplied. On November 15, 1906, and for some time previous thereto, appellee and his buddy had been engaged in driving a room neck off of the seventh south entry in appellant's mine. The evidence tends to show that there were no props or cross-bars in said room neck, and that for four or five days prior thereto the roof of said room neck was in a dangerous condition, due to the presence there of loose rock. Appellee testified that he was unable to read or write and that he procured his fellow miners, Zimontis and Ragutis, to fill out slips demanding nine foot bars for his working place upon each of the five days immediately preceding the day of the accident, and that he then deposited such slips in the box provided by appellant for that purpose, but that no props as demanded were delivered at his working place by appellant. Zimontis testified that he filled out slips at the request of and as directed by appellee upon two or three days immediately preceding the accident and that such slips were deposited in the box; that he thought appellee had requested him to order ten foot props and seven foot cross-bars, but could not remember positively, because he frequently filled out slips for other persons who could neither read nor write. Ragutis testified that he was unable to write and had written no orders for appellee, but that he had seen Zimontis write an order on one occasion four or five days preceding the accident, and had seen such order deposited in the box by appellee. A brother of appellee testified that he was working with appellee as his buddy at the time of the accident and saw Zimontis write orders for timbers at the request of appellee upon three several days

within five or six days preceding the accident and saw such orders deposited in the box.

In contradiction of this evidence introduced on behalf of appellee, appellant offered Exhibits 1, 2 and 3, designated as "timber sheets" of the mine for November 13, 12 and 14, respectively, purporting to be correct transcripts of all the timber tickets for said days found in the box. These timber sheets contain no orders by appellee for timbers upon the several days indicated. Upon this evidence we are not prepared to say that the finding of the jury that appellee ordered timbers by depositing slips in the box as claimed by him is against the manifest weight of the evidence. In order to reach this conclusion it would be necessary to wholly disregard the evidence of three witnesses who testified positively that order slips for timbers were deposited in the box by appellee. If the question was determinable upon the probabilities of the case, alone, we should be disposed to say that there was more likelihood that the record of order slips in the box made by servants of appellant in the regular course of their employment and duty was accurate, than the testimony of witnesses based upon their recollection of events some time past, that they saw such slips placed in the box. It is possible that the slips in question may have been lost or overlooked after they were placed in the box, but it is hardly probable that such loss or oversight only occurred with regard to the order slips of appellee.

It is urged that the court erred in refusing an instruction offered by appellant which informed the jury that if the defendant or its agents never saw and never knew of the slips claimed by appellee to have been placed in the box by him they should find appellant not guilty, even though they might believe that such slips were actually deposited in the box; that in that state of the proof there would be no wilful failure on the part of appellant and, therefore, no liability.

At the instance of appellee the court instructed the

jury in substance that, where a general custom or usage exists in a mine that timber orders shall be signed by the miner and placed in a box provided for that purpose by the mine operator, the signing of such order by a miner and depositing the same in such box constituted in law a demand for timbers upon the mine manager and mine operator, and that a failure to comply with such demand when so made constituted a wilful failure by the mine operator within the meaning of the statute. We think that the instruction offered by appellant was properly refused and that the instruction given at the instance of appellee correctly stated the law applicable to the case. Where a mine operator adopts an exclusive method whereby a miner is required to make his demands for necessary timbers, it must be held that a compliance by the miner with such method constitutes a demand for such timbers within the meaning of the statute, and that a failure on the part of the mine operator to comply with a demand so made constitutes a wilful failure within the meaning of the statute. To hold otherwise would result in enabling a mine operator to adopt a method in that regard whereby he might evade the responsibility and liability imposed upon him by the statute.

The eleventh instruction offered on behalf of appellant and refused by the court was sufficiently covered by the fourth, fifth and sixth instructions given at the instance of appellee and by the first and fourth instructions given at the instance of appellant.

It is lastly urged that the damages awarded to appellee are excessive. The evidence discloses that the right ankle of appellee was severely sprained; that he suffered considerable pain up to the time of the trial in October, 1907; that he was confined to his house for a month and was not able to resume work until six weeks after his injury; that at the time of his injury he was earning from \$70 to \$90 a month, and after he resumed work at the time of the trial he was earning from \$40 to \$60 a month. While the damages

Shoot v. C., C., C. & St. L. R. Co., 145 App. 532.

awarded to appellee are exceedingly liberal in amount, we do not think they are so excessive as to require us to reverse the judgment or to insist upon a *remittitur* therefrom.

There is no error in the record and the judgment of the Circuit Court will be affirmed.

Affirmed.

Clarence Shoot, Administrator, Appellee, v. Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, Appellant.

1. **COMMON CARRIERS**—*when liable for delays in transportation.* In the absence of a special contract on the part of the carrier to deliver within a specified time, mere delay in transportation does not create a liability, but when the delay is beyond the time usually required to transport the shipment, the burden is cast upon the carrier to explain such delay and that it did not result from negligence.

2. **COMMON CARRIERS**—*burden to show knowledge by shipper of restrictive conditions of contract signed by him.* The burden is upon the carrier to show knowledge of and assent by the shipper to restrictive provisions contained in the contract signed by him and the fact that the shipper in making and presenting his claim for damages to the carrier complied with the provisions of such contract in that respect, is not conclusive evidence of his knowledge of and assent to the terms of such contract when he signed the same.

Trespass on the case. Appeal from the Circuit Court of Coles county; the Hon. JAMES W. CRAIG, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

GEORGE B. GILLESPIE, for appellant; L. J. HACKNEY, HAMLIN, GILLESPIE & FITZGERALD, and ANDREWS & VAUSE, of counsel.

A. C. ANDERSON, for appellee.

Shoot v. C., C., C. & St. L. R. R. Co., 145 App. 532.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit originally instituted by appellee's intestate, T. T. Shoot, against appellant to recover damages alleged to have accrued by reason of the failure of appellant to carry and deliver thirty-five head of cattle within a reasonable time after the shipment of said cattle from Charleston to Chicago. A judgment recovered by plaintiff on the first trial was reversed upon appeal to this court and the cause remanded for another trial. C., C., C. & St. L. Ry. Co. v. Shoot, 130 Ill. App. 139. Thereafter the plaintiff died and upon suggestion of his death, his administrator, Clarence Shoot, was substituted as party plaintiff. Upon the next trial there was a verdict and judgment against defendant for \$210.82, from which judgment this further appeal is prosecuted.

The evidence tends to show that on Tuesday January 19, 1904, in pursuance of a previous arrangement entered into between Shoot and the local agent of appellant at Charleston, Shoot drove his cattle to the local yards at Charleston for shipment to Chicago upon a freight train of appellant, scheduled to leave Charleston at 1:15 p. m.; that the usual shipping route for live stock from Charleston to Chicago was by way of Mattoon, from which latter place to Chicago, the Illinois Central R. R. Co. acted as the connecting carrier of appellant; that the freight train of appellant did not arrive at Charleston until 11:30 p. m., and that in consequence of the delay in leaving Charleston and the subsequent delay in carrying the cattle from Mattoon to Chicago the cattle did not arrive at their destination in Chicago until about 12 o'clock noon on Thursday, January 21st. The time consumed in transporting the cattle from Charleston to Chicago was so greatly in excess of the time ordinarily required for like shipments that the burden was cast upon appellant to show that the delay was without its fault and, therefore, not unreasonable.

In the absence of a special contract on the part of the carrier to deliver within a specified time, mere delay in transportation does not create a liability, but when the delay is beyond the time usually required to transport the shipment, the burden is cast upon the carrier to explain such delay and that it did not result from negligence. *St. L. N. B. T. Ry. Co. v. Tassey*, 122 Ill. App. 339; *Adams Ex. Co. v. Bratton*, 106 Ill. App. 563; *W. St. L. & P. Ry. Co. v. McCasland*, 11 Ill. App. 491.

The obvious reason for this trial is that the facts relating to the situation and the circumstances attending the delay are peculiarly within the knowledge of the carrier and not readily ascertainable by the shipper.

As to the cause of the delay in transporting the cattle from Mattoon to Chicago appellant offered no explanation or excuse whatever. In an effort to explain the delay in the arrival of its freight train at Charleston appellant offered some evidence to the effect that one of its engines, which was hauling a passenger train, gave out en route because of leaky flues; that the freight train in question was side-tracked, the engine detached therefrom and attached to the passenger train, which was then hauled to its destination; that thereafter, the freight engine was re-attached to the freight train and the run of that train was then resumed. The evidence so offered by appellant consisted entirely of the conclusion of witnesses that the failure of the passenger engine could not be foreseen or anticipated, and that no engine, other than the freight engine, was available for the purpose of hauling the passenger train. No fact was stated which tended to show that appellant had exercised ordinary care in the inspection and operation of its passenger engine or that it was not guilty of negligence in the premises, and no offer of such proof was made by appellant. There is no competent evidence in the record in support of appellant's contention that the delay in the ar-

rival of the freight train at Charleston was not due to its negligence.

Previous to the shipment of the cattle by him Shoot signed what is known as a limited liability live-stock contract, which provided among other things that appellant should not be liable for any loss or damage on account of delay in shipment of the cattle beyond the actual expense of feeding and caring for them during the delay. The burden was upon appellant to show that Shoot had knowledge of and assented to the restrictive provisions of the contract signed by him. C., C. & St. L. Ry. Co. v. Shoot, *supra*. The evidence bearing upon this question of fact was conflicting and we are not prepared to say that the verdict of the jury upon the issue was against a clear preponderance of such evidence. The fact that Shoot, in making and presenting his claim for damages, complied with the provisions of the contract in that respect is not conclusive evidence of his knowledge of and assent to the terms of such contract when he signed the same.

It is urged that the court, over the objection of appellant, improperly permitted Shoot to testify that another freight train passed through Charleston bound for Mattoon while he was waiting for the local freight train which was to carry his stock. It is a sufficient answer to this contention to say that the evidence was admitted upon the direct examination of the witness without objection, and that counsel for appellant cross-examined the witness with reference thereto at length without offering any suggestion as to the impropriety of such line of examination.

Shoot paid a charge of \$49.75 for feeding and caring for the cattle in the stock yards at Chicago, and appellee introduced evidence tending to show that such charge was reasonable. Manifestly, the cattle could not have been kept there without incurring some expense in that respect and there was no error in admitting evidence of such payment by Shoot and that the charge made therefor was reasonable.

Kuhn v. Eppstein, 145 App. 536.

As appellant neither introduced nor offered any competent evidence tending to show that the delay in the transportation of the cattle was not due to its negligence or the negligence of its connecting carrier, the court did not err in modifying and giving the first and second instructions tendered by appellee. The only issue of fact remaining in the case other than the amount of damages sustained by him, was whether or not Shoot had knowledge of and assented to the terms of the shipping contract.

We perceive no substantial error in the record and the judgment of the Circuit Court will be affirmed.

Affirmed.

Isaac Kuhn, Appellee, v. Samuel Eppstein et al., Appellants.

SPECIFIC PERFORMANCE—relief accorded where property sought to be obtained pursuant to contract has been destroyed pendente lite. In a proceeding to enforce specific performance of a contract for the sale and conveyance of improved property if the improvements upon such property have been destroyed *pendente lite*, the difference between the market value of the land immediately before the destruction of such improvements and the like value immediately thereafter should be ascertained and a corresponding abatement made in the purchase price provided for in the contract.

Bill in equity. Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the October term, 1907. *Affirmed.* Opinion filed November 17, 1908.

WILLIAM E. O'NEILL and A. D. MULLIKEN, for appellants.

RAY & DOBBINS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is an original and supplemental bill in equity filed by appellee against appellant to enforce specific performance of the following contract:

“CHAMPAIGN, ILLINOIS, June 7, 1904.

“I herewith acknowledge receipt of five hundred dollars as part payment on my building, 41 Main Street, which I sell and convey to Isaac Kuhn for seventy-five hundred dollars; and I hereby agree to deliver to Isaac Kuhn, Champaign, Illinois, on or before July 1, a clear title and deed, free of any and all encumbrances whatsoever, taxes paid by me to date of delivery of abstract, on payment of balance by said Isaac Kuhn of seven thousand dollars.

SAMUEL EPPSTEIN.”

At the date of the contract Samuel Eppstein was the equitable owner of the premises involved, the legal title to which was in his son, William D., and said premises were then occupied by one McDonnell as a tenant of Samuel Eppstein. Prior to July 1, 1904, William D. Eppstein executed a deed conveying said premises to appellee and the deed was sent to a bank in Champaign with instructions to deliver the same to appellee, upon the payment by him of \$7,000, the balance of the purchase price. On July 1, 1904, appellee tendered to the bank the sum of \$7,000 and then demanded a delivery to him of the deed and possession of the premises. The officers of the bank having no authority with reference to the delivery of the possession of the premises then occupied by McDonnell, refused the demand of appellee and he thereafter filed his bill for a specific performance of the contract, and for an abatement of the purchase price on account of damages claimed to have been sustained by reason of the failure of Samuel Eppstein to perform the contract. McDonnell remained in possession of the premises until December 22, 1904, when the building thereon was destroyed by fire, whereupon he vacated the same

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and claimed no further right or interest therein. Appellee then filed his supplemental bill wherein he alleged the destruction of the building by fire, and prayed that an abatement be made from the contract price of the amount of deterioration in the value of the premises resulting from the fire. The right of appellee to the relief prayed was sustained by the Supreme Court in an opinion reported in 219 Ill. 154. The cause was then heard in the Circuit Court to determine the amount of damages to which appellee was entitled for the non-performance of the contract and the abatement to be made from the contract price by reason of the deterioration in the market value of the premises resulting from the fire. Upon such hearing a decree was entered, from which decree, appellants here prosecuted an appeal to the Supreme Court. Upon that appeal the decree of the Circuit Court was reversed and the cause remanded "with directions to the Circuit Court to hear further testimony of the parties, or either of them, as to the difference in the value of the premises, if any, resulting from the encumbrance by virtue of the lease to McDonnell and the deterioration in the market value caused by the fire," and it was there further said by the court: "If the proof shows that the market value of the premises has been diminished by one or both of these causes, the amount of such diminution is to be deducted from the \$7,000 and a conveyance ordered made to appellee upon payment of the balance." *Eppstein v. Kuhn*, 225 Ill. 115. Upon the remandment of said cause to the Circuit Court the same was referred to a special master to take and report the proofs together with his findings thereon, and thereafter the said special master filed his report wherein he found:

"First. That while the evidence shows that the probable market value of the premises at the time of the sale to complainant Kuhn was less than if said premises had been free and clear of said lease thereon to McDonnell, still the evidence fails to show any defi-

nite amount, so that a finding of nominal damages is all that can be made on said account.

“Second. That the evidence shows that the market value of the premises in question has been damaged or deteriorated on account of the fire in question, which occurred on the 22nd day of December, 1904, to the amount of \$3,918.”

Objections were filed both by the appellee and the appellants to said report of the master, which objections were by him overruled, and upon said objections standing as exceptions to said report, the cause was heard by the chancellor who overruled the exceptions and entered a decree finding that the market value of the premises had been damaged in the amount of \$3,918, and that said sum should be deducted from the balance of the contract price of \$7,000, leaving a balance of \$3,082 due the appellants. The decree further directed that upon the payment of said sum of \$3,082 by appellee to appellants, or to the clerk of the court for said appellants, that the bank deliver to appellee the deed for the premises in controversy; that upon the failure or refusal of the bank so to do, the special master execute the decree by conveying the said premises to said appellee.

It is insisted on behalf of appellants that the decree is predicated upon the admission and consideration by the chancellor of incompetent and improper evidence as to the damage resulting from the destruction by fire of the building upon the premises; that the destruction of the building by fire resulted in a permanent injury to the premises and that in such case the true measure of damages is the difference between the market value of the land immediately before the fire occurred and the like value immediately after the fire.

The evidence discloses that the building upon the premises was not merely damaged or rendered less capable of use for the purpose for which it was intended and used, but was practically wholly destroyed by fire. In such case the injury to the premises may

properly be held to be permanent in character and the measure of damages as contended for by appellants, should be applied. The case of *Fitz Simons v. Braun*, 199 Ill. 390, relied upon by appellee as announcing a different rule, is to be distinguished from the case at bar. The *Fitz Simons* case was an action to recover damages for an injury to a building caused by the use of dynamite in excavating a tunnel, where the evidence tended to show that the injury to the building was of such a character that it could be precisely remedied by repairs, and where no interest or right in the land apart from the building was involved, and it was held that the cost of repairing the building and restoring it to its proper condition was the true measure of the damages.

In *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, Lombard filed a bill to enforce the specific performance of a contract to convey to him certain premises including a church edifice, and before the contract was executed the building was destroyed by fire. It was held that Lombard was entitled to maintain his bill and to obtain so much of the property agreed to be sold as he could get and compensation to be deducted from the purchase money for the portion of the property destroyed, pending the option of the vendors. The compensation here mentioned we take to mean the amount required to make the vendee whole; that is, to give to him the equivalent of what he lost by the failure of the vendor to convey the premises contracted to be conveyed. And where, as in the case at bar, the premises contracted to be conveyed are permanently injured or are impossible of restoration, the compensation to be awarded to the complainant vendee is the difference between the market value of the property in its condition immediately before the injury and the like value immediately after the injury.

Appellants assume a somewhat anomalous position in this case. Notwithstanding their contention that evidence as to the cost of the restoration of the building

upon the premises, or rather the cost of the construction of a new building similar in design to the one destroyed by fire, was improperly admitted and considered by the court, the record discloses that the only evidence introduced on behalf of appellants except the testimony of the witness Hefferman, was evidence of that character. Charles M. Ford and George S. Meades, two building contractors, called as witnesses on behalf of appellants, testified that they would be willing to put the building in its former condition for \$2,100 and \$2,140 respectively. Hefferman, the other witness called on behalf of appellants, did not assume to state his opinion as to the value of the premises before the fire, but merely testified that the property in its then condition was worth between \$6,000 and \$6,500 and that he would then give for it \$6,500 in cash. The witness testified in February, 1907, or thereafter, and the valuations fixed by him were as of the date when he testified. It is obvious, therefore, that his testimony did not shed any light upon the real question at issue, which was the value of the property at the date of the contract, July 1, 1904. That appellants have shifted their position with reference to the competency of evidence tending to show the cost of replacing the building upon the premises, as a proper element to be considered in determining the amount of damages to be awarded appellee, is apparent also from the fact that they interposed no objection to evidence of that character given by the witnesses Charles C. Glenn, J. H. Vredenburg, Frank H. Jahr and B. F. Miller, called upon behalf of appellee.

Appellee, however, offered competent evidence to determine the amount of damages under the correct rule. The uncontradicted evidence tends to show that the lot without the building was worth on July 1, 1904, from \$3,000 to \$3,500. F. H. Jahr testified that the improvements on the lot were worth \$5,000 prior to the fire. Seeley Brown testified that the building without regard to the lot was worth probably from \$3,500 to

\$4,000 at the time of the fire. Charles J. Mulliken testified that the building without reference to the lot was worth about \$4,000 at the time of the fire, and that the building and lot free and clear of encumbrances was worth about \$7,000 on July 1, 1904. Robert C. Wagner testified that the property on July 1, 1904, prior to the fire was worth about \$7,000. E. A. Gardner testified that the building was worth about \$4,000 just prior to the fire. John B. Weeks testified that the building was worth about \$5,000 just prior to the fire. J. F. Hessel testified that the building was worth at least \$1,900 at the time of the fire. H. T. Sperry testified that the value of the building prior to the fire was about \$4,500. There is ample competent evidence in the case to determine the amount of damages which appellee is entitled to recover measuring the same by the true rule, and we are of opinion that the finding of the master approved by the chancellor, fixing the amount of such damages at \$3,918, is approximately correct and should be sustained. The evidence tends to show that there was a marked advance in the market value of business property in the city of Champaign following July 1, 1904, and in view of the fact that much of the evidence as to the value of the building prior to the fire related to the 22nd of December, 1904, when the fire occurred, it is probable that such advance in the market value of property following July 1, 1904, influenced the witnesses to fix the value of the building immediately before the fire at a greater amount than the building was actually worth on July 1, 1904.

Appellee has assigned cross errors on the finding of the master approved by the chancellor that the evidence fails to show any definite amount of damage sustained by appellee by reason of the fact that the premises involved were subject to an encumbrance thereon of a lease to McDonnell, and that appellee was entitled to no more than nominal damages on that account, and also upon the finding that appellee was

only entitled to \$3,918 as damages for deterioration in the market value of the premises caused by the fire. Appellee insists that the evidence in the record is ample to sustain a finding that damages amounting to at least \$500 were sustained by him because of the leasehold encumbrance. Aside from the testimony of appellee that he gave at least \$1,000 or \$1,200 more for the property than he would have given if there had not been a lease on it, there is no evidence in the record to sustain the claim of appellee for damages upon that account. Such testimony was wholly insufficient to justify a finding in favor of appellee of any depreciation in the market value of the premises occasioned by the leasehold encumbrance. Appellee was only entitled to recover the damages to the market value of the premises occasioned by said encumbrance, and any personal considerations which may have moved him to pay more for the property without such encumbrance manifestly constituted no proper basis upon which to determine the depreciation, if any, in the market value of the premises occasioned by such encumbrance.

Upon a consideration of the whole record we are not persuaded that the decree is erroneous and it will, therefore, be affirmed.

Affirmed.

**Abraham Lunger, Appellee, v. City of Chrisman,
Appellant.**

1. DRAINAGE—*when obligation to repair arises.* Having voluntarily assumed to construct a drain, a district, by virtue thereof, impliedly assumes the obligation to keep such drain in repair.

2. VERDICT—*when not disturbed as against the evidence.* A verdict not clearly against the weight of the evidence will not be set aside on review.

Action on the case. Appeal from the Circuit Court of Edgar

Lunger v. City of Chrisman, 145 App. 543.

county; the Hon. JAMES W. CRAIG, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

DYAS & DYAS, for appellant.

W. H. CLINTON, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellee against appellant to recover damages for wrongfully causing the natural flow of surface water over and across appellee's premises to become obstructed, whereby said surface water was caused to back up and stand upon appellee's premises, thereby injuring and destroying his garden and damaging his well and other property. A trial by jury resulted in a verdict and judgment against appellant for \$200. The only ground urged for a reversal of the judgment is, that the evidence does not sustain the charge that the injuries complained of resulted from the negligent and wrongful acts of appellant.

Appellee is the owner of and resides upon three adjacent lots, located in the southwest part of the city of Chrisman. The right of way of the C., H. & D. Ry. Co. adjoins appellee's premises on the south, and the right of way of the C., C., C. & St. L. Ry. Co. is located about 400 feet west of appellee's premises. The natural flow of the surface water in that locality is toward the north and east. Some time prior to the injuries complained of, appellant constructed a 15-inch tile drain from the right of way of the C., H. & D. Ry. Co. northeasterly through the premises of appellee, thence east in an alley through the middle of the block east of appellee's premises, thence north on Illinois street a distance of a block and a half, thence east and north to its outlet. The evidence tends to show that appellant permitted this tile drain to become partially choked up and obstructed by mud, roots of trees and debris. Through the middle of the block, situated east

and northeast of appellee's premises, an alley is laid out, which the evidence tends to show was graded by appellant to a height of several inches above the natural level of the ground in that locality, without providing any outlet for the surface water, and that this elevation in the grade of the alley prevented the surface water from escaping from appellee's premises to the east and north in the course of its natural flow.

While the obligation of the appellant to construct drains was voluntarily assumed, yet, when it constructed such drain for the benefit of the public, it then became the duty of appellant to see that said drain was kept in repair. *City of Chicago v. Seben*, 165 Ill. 371. And while a municipal corporation may regulate and establish the grade of its streets and alleys it may not do so in such manner as to obstruct the natural flow of surface water and thereby cast it upon the property of a citizen, to his injury, without being liable to respond in damages therefor. *City of Dixon v. Baker*, 65 Ill. 518; *Elser v. Village of Gross Point*, 223 Ill. 230.

The evidence in the record fully sustains the charges of negligence against appellant in the respects mentioned, and the judgment of the Circuit Court will be affirmed.

Affirmed.

Mary Reavely, Appellee, v. Clara Harris, Appellant.

1. EVIDENCE—*when not competent to corroborate witness.* A witness who has made contradictory statements may rarely be supported by the introduction of evidence that at other times and places he has made consistent statements.

2. EVIDENCE—*when objection to lack of foundation for telephone conversations comes too late.* The laying of the foundation for the introduction of telephone conversations is waived by a failure to object thereto in the trial court and by the complaining party

Reavely v. Harris, 145 App. 545.

having introduced like conversations without laying a foundation therefor.

3. WITNESSES—*when may be permitted to testify notwithstanding they have remained in the court room during the trial contrary to order of court.* It is within the discretion of the court to permit such a witness to testify.

4. WITNESSES—*when attorney justified in testifying.* An attorney is justified in taking the stand in an emergency to prevent a possible miscarriage of justice and to meet a false aspersion cast upon his professional character.

5. INSTRUCTIONS—*when action of court in refusing waived.* The action of the court in refusing a peremptory instruction is waived by the defendant thereafter introducing evidence upon his own behalf.

6. PLEADING—*when declaration in action for alienation of affections sufficiently avers marriage.* Held, that the allegations of the declaration in this case sufficiently averred the existence of the marriage relation between the plaintiff and her husband whose affections it was alleged had been alienated; likewise that such declaration sufficiently averred that prior to the acts of the defendant complained of plaintiff had the affections of her husband.

7. PLEADING—*when declaration charging alienation of affections sufficient.* In an action for alienation of affections the pleader is not required specifically to aver the means used by the defendant to effect the wrongful alienation but an averment of the ultimate fact is sufficient.

Action in case. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1907. Affirmed. Opinion filed November 17, 1908.

JOHN C. SNIGG, JOHN G. FRIEDMEYER and C. F. MORTIMER, for appellant.

S. H. CUMMINS and STEVENS & STEVENS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

The defendant, Clara Harris, prosecutes this appeal to reverse a judgment against her for \$5,000, rendered upon a verdict for that amount in an action by the plaintiff, Mary Reavely, to recover damages for criminal conversation and for alienating the affections of her husband, John S. Reavely. It is urged that the

trial court erred in the following particulars: First, in refusing to admit competent evidence offered on behalf of defendant; second, in admitting incompetent evidence offered on behalf of plaintiff; third, in refusing to give the peremptory instruction offered by defendant at the close of plaintiff's evidence; fourth, in ruling upon the instructions, and, fifth, in overruling the motion for a new trial upon the ground that the verdict was not supported by the evidence.

There was evidence tending to show that the witness, Rose Link, called on behalf of defendant, had made contradictory statements relative to certain transactions involved in the case, and defendant for the purpose, as it is claimed, of corroborating said witness, sought to show that the witness had upon a prior occasion made statements consistent with her testimony upon the trial. Evidence of this character and for the purpose indicated is rarely admissible (*Chicago City Ry. Co. v. Matthieson*, 212 Ill. 292), but the record discloses that the purpose was not made known to the court, even after inquiry, and it did not appear what the alleged consistent statements were or when they were made. There was no error in sustaining plaintiff's objection to the evidence as offered.

For the purpose of contradicting the witness Rose Link, as to the matter of a conversation between her and one of the attorneys for the plaintiff, the latter deemed it necessary to take the stand and testify to his version of the conversation. The court had ordered that all of the witnesses for the respective parties be excluded from the court room until called for examination, and it was objected that as the said attorney had been present during the trial he should not be permitted to testify. The enforcement of the rule was within the discretion of the trial court, and the exercise of that discretion in such case is not open to review. Notwithstanding his relation as attorney in the case, we think, the witness, in view of the emergency

and in order to prevent a possible miscarriage of justice and to meet a false aspersion cast upon his professional character, was justified in testifying in the case.

It is argued that the court erred in admitting in evidence conversations over the telephone, without requiring sufficient foundation to be laid as to the identity of the parties involved. Evidence of this character was introduced indiscriminately by both parties without any objection by either, and the competency of such evidence cannot be challenged for the first time in this court. For the same reason defendant is precluded from raising any question as to the competency of the evidence of plaintiff and her daughter detailing the substance of conversations between plaintiff and her husband.

Defendant, after her request that a peremptory instruction be given at the close of plaintiff's evidence was denied, introduced evidence in support of her defense, and did not renew her request for a peremptory instruction at the close of all the evidence.

In this state of the record this court is not called upon to consider and determine the propriety of the action of the trial court in refusing the peremptory instruction offered at the close of plaintiff's evidence. *P., C., C. & St. L. Ry. Co. v. Hewitt*, 202 Ill. 28; *Union Trac. Co. v. O'Donnell*, 211 Ill. 349; *Streator Ind. Tel. Co. v. Cont. Tel. Con. Co.*, 217 Ill. 577.

It is insisted that the first, second, third and seventh instructions given to the jury at the instance of plaintiff are erroneous because they refer to the second count of the declaration, which it is contended does not contain the necessary allegations that plaintiff was married to John S. Reavely and had the affections of her said husband, and does not set out the particular acts and conduct employed by defendant to influence the alienation of the affections of plaintiff's husband. The allegations of the second count of the declaration in the respects mentioned, are as follows:

"For that, whereas, the defendant contriving and wickedly intending to injure the plaintiff, and to deprive her of the society and assistance of John S. Reavely, the husband of the plaintiff, on to-wit, the 1st day of August, A. D. 1906, and on divers other days between that time and the commencement of this suit, in the county of Sangamon and state of Illinois, did wilfully and maliciously destroy and alienate from the plaintiff the affections then and there had by the said John S. Reavely, then and there the husband of the said Mary Reavely, for the said Mary Reavely, the said Mary Reavely in no wise consenting thereto, by means whereof the plaintiff has from thence hitherto wholly lost and been deprived of the society, affections, assistance and comfort of the said John S. Reavely, her said husband, in her domestic affairs, which the plaintiff during all of said time ought to have had, to the damage of the plaintiff," etc.

These allegations of the declaration sufficiently aver the existence of the marriage relation between plaintiff and John S. Reavely, and that plaintiff had the affections of her husband. The rule of pleading applicable in such cases seems to be that the pleader need not specifically aver the means used by the defendant to effect the wrongful alienation of the affections of the plaintiff's husband or wife, but that an averment of the ultimate fact is sufficient. *Williams v. Williams*, 20 Col. 51; *Wales v. Miner*, 89 Ind. 118. To aver the specific acts, conduct and means employed by the defendant to effect the ultimate purpose, would be to plead the evidence in the case. Defendant, however, is in no position to criticise the declaration or the instructions in the respects mentioned because the first instruction given at her request authorized a verdict for the plaintiff upon proof of the allegations of the declaration.

It is next urged that the court erred in improperly modifying certain instructions asked on behalf of defendant. The modifications in the main consisted in striking out of the instructions as offered the re-

quirement that plaintiff, in order to recover must show by a preponderance of the evidence that the defendant by her wilful and malicious acts and conduct caused the wrong complained of, and inserting in lieu thereof the requirement that plaintiff, in order to recover, must show by a preponderance of the evidence that the defendant alienated the affections of plaintiff's husband in manner and form as charged in the second count of the declaration. The insistence that such modification of the instructions eliminated the requirement that the conduct of the defendant in that regard must have been wilful and malicious, conceding that to be necessary is without merit, because, as we have heretofore shown, the second count of the declaration contains the express averment that defendant did wilfully and maliciously alienate from the plaintiff the affections of her husband. The modification, therefore, did not affect any substantial change in the instructions as offered.

The defendant is a confessed prostitute and keeper of a house of assignation. That she successfully practiced every art and allurement known to a woman of her character to induce the husband of plaintiff to unfaithfulness and the abandonment of plaintiff, is fully established by the evidence. The evidence also tends to show that the conduct of the defendant in that regard was persisted in wilfully and maliciously. That she had threatened to separate the plaintiff and her husband or die in the attempt.

Some evidence was introduced by defendant tending to show that plaintiff was a frequent visitor at the house of defendant for the purpose of illicit intercourse, but a careful examination of the testimony bearing upon that question, as it appears in the record, convinces us that it is a mere tissue of fabrications. Neither the motion for a new trial nor the assignment of errors challenges the amount of the verdict as being excessive.

There is no error in the record prejudicial to appellant and the judgment of the Circuit Court will be affirmed.

Affirmed.

Boldman & Davis, Appellees, v. Illinois Central Traction Company, Appellant.

1. **MECHANIC'S LIENS**—*when subcontractor entitled to recover in excess of amount due to contractor.* Held, under the particular facts of this case, that the decree in favor of the subcontractor for a greater sum than that which was shown to be due from the owner to the original contractor was justified.

2. **MECHANIC'S LIENS**—*when notice of claim filed in time.* Held, under the evidence in this case, that the notice of claim for lien was filed within twenty days after the completion of the subcontract relied upon as the basis of the relief sought.

3. **MASTER IN CHANCERY**—*when report of, conclusive as to findings of fact.* In the absence of objections and exceptions to the report of the master, the same is conclusive as to all findings of fact.

Mechanic's lien. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

GRAHAM & GRAHAM, for appellant.

ALBERT SALZENSTEIN and JOHN L. KING, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a petition filed by appellees against appellant and one Connors, the original contractor, to enforce a subcontractor's lien, under the Railroad Lien Act, for work done in grading the track of appellant's railway between stations 210 and 299 near Riverton.

The amount claimed in the petition to be due to ap-

pellees on October 1, 1904, is \$4,500. The answer of appellant admits that Connors was the original contractor and that appellees were subcontractors. Further, the answer avers that there was due and unpaid to said Connors, on October 1, 1904, the sum of \$1,000, of which amount the sum of \$840, less the sum of \$159.15, owing by appellees to Connors on a set-off, was due to appellees, and that appellant was ready and offered to pay the same but appellees had refused to accept it. The answer of Connors is the same in substance as the answer of appellant, except that it avers a formal claim of the set-off for said sum of \$159.15, and sets up in detail the several items of said claim. The cause was referred to the master to take the proofs and report the same together with his conclusions. The master found that the original and sub-contracts were made as alleged in the petition; that appellees entered upon the performance of their sub-contract and ceased work thereon the latter part of 1903 or the first part of 1904, and that additional work was done by Boldman, one of the appellees, on September 30, 1904; that a notice of lien as required by statute was filed by appellees on October 19, 1904; that under the contract with Connors there was due to appellees from appellant the sum of \$840, which amount was subject to a set-off in favor of Connors for \$159.15; that ever since appellees ceased said work appellant and Connors had been ready and willing to pay to them the said sum of \$840 after deducting therefrom the said sum of \$159.15; that the equities of the cause were with appellant and Connors, and that appellees were not entitled to a lien upon the property of appellant. Objections filed by appellees to said report were overruled by the master, and thereafter the cause was heard by the chancellor upon such objections standing as exceptions to said report. Upon such hearing, the exceptions filed by appellees as to the amount due and as to their right to a lien was sustained. The decree finds that the equities of the cause

are with appellees; that under the contract with Connors there is due appellees from appellant the sum of \$1,542 less the sum of \$159.15 due from appellees to Connors, and that appellees are entitled to a lien upon the property of appellant for the sum of \$1,382.85.

It is first insisted by appellant that as the answers filed by it and by Connors to the petition both allege that the amount due Connors is \$1,000, and the amount due appellees is \$680.85, and that as appellees are, in any event, only entitled to a lien to the extent of the amount due from appellant to Connors on October 19, 1904, the date when the notice of lien was filed for record, appellees are concluded by the allegations of the answers of the respective defendants in that respect and can claim no greater amount. Section 2 of the Lien Act under which the lien in this case is asserted, provides that the aggregate of all liens thereby authorized shall not, in any case, exceed the price agreed upon in the original contract, to be paid by the corporation to the original contractor. Hurd's Stat. 1905, 1316.

Neither the original contract nor the subcontract provided for the payment of a sum in gross by appellant for the work and labor to be performed, but the amount thereby provided to be paid depends upon the quantity of material excavated or used in constructing the grade, and the price to be paid therefor depends upon the character of the material so excavated or used. If in performing the contract appellees, as sub-contractors, excavated or used a greater quantity of material than they were given credit for by the estimates made by appellant or Connors, they are entitled to recover therefor, notwithstanding appellant and Connors may have agreed among themselves that the latter had, under his original contract, excavated or used a less quantity of material in constructing the grade.

If the amount payable by appellant to Connors for the work performed under the original contract had

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been a sum in gross, there would be merit in appellant's contention that a subcontractor could not enforce a lien for a greater amount than was due and owing to the original contractor, and if the payments made to the original contractor were not in derogation of the rights of the subcontractor, that the subcontractor would be limited in his recovery to the amount due the original contractor at the date of filing a notice of claim or lien. In the case at bar the controversy arises upon the claim of appellees that they have excavated and used a greater quantity of material than they have been allowed credit for by either the appellant or Connors. Furthermore, there is evidence in the record tending to show that because of differences which arose during the progress of the work between appellees and Connors, it was agreed between all the parties that appellant should deal directly with appellees in paying them the amount due under their contract.

It is next claimed by appellant that the notice of claim or lien was not filed by appellees within twenty days after the completion of their subcontract, and that they are, therefore, barred from asserting and enforcing a lien. Both the original and subcontracts provided that the work should be completed by November 30, 1903. The evidence tends to show that the work was practically completed in January, 1904, and that almost continuously thereafter appellees attempted to arrive at a settlement with appellant for the work and labor performed; that appellees claimed that they had performed much more work and labor than appellant was willing to concede, and that appellant finally made a claim that appellees had not completed the work according to contract, in that there were some fence fixing and brush burning to be done, and that on September 30, 1904, appellee, Boldman, performed such work. It is conceded by appellant that additional work was done on the day named, and we think it clearly appears that such additional work was done to meet, in part at least, a complaint by ap-

pellant that the work had not been performed according to contract.

The finding by the master that additional work was done by one of the appellees on September 30, 1904, manifestly has reference to the doing of such work under the contract, and as appellant filed no objection or exception to the finding of the master in that regard, it is precluded from raising the question in this court. In the absence of objections and exceptions thereto the report of the master must be held conclusive as to all findings of fact. *Matthews v. Whitethorn*, 220 Ill. 36. According to the estimates furnished by appellant to appellees the work performed by the latter was 56,281 yards of embankment, while the amount claimed by appellee is 73,854 yards, making a difference in favor of appellees of 17,573 yards. By the decree the court allowed appellees for 59,671 yards or 3,390 yards in excess of the quantity as estimated by appellant. The amount of yardage claimed by appellees is predicated solely upon the evidence of Harvey, a civil engineer, who made measurements in July, 1906, nearly two years after the work was completed, and it is manifest that the finding of the chancellor was not influenced to any considerable extent by the evidence of such witness as to the amount of work performed by appellees. Counsel for appellant express their ignorance of the theory adopted by the chancellor in arriving at the amount fixed in the decree, and counsel for appellees have not considered it necessary to enlighten this court upon that question.

A careful consideration of the evidence in the record however, leads us to the conclusion that the chancellor substantially adopted the estimate of appellant as to the quantity of material in the grade and then added thereto a certain percentage for shrinkage, which it is admitted by all of the witnesses is properly allowable in such cases, and which does not appear to have been taken into account in the estimate made by appellant.

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Assuming that the chancellor predicated his finding as to the amount of work performed by appellees upon the theory here suggested we are opinion that it approximates very nearly the actual amount of work performed by appellees.

We are not persuaded that the decree in this case is palpably erroneous and it will, therefore, be affirmed.

Affirmed.

Truman L. Crowder, Administrator, Appellee, v. Chicago & Alton Railroad Company, Appellant.

1. MASTER AND SERVANT—*duty to furnish safe place to work.* A master is only bound to use reasonable care to furnish his servants with a reasonably safe place to work.

2. MASTER AND SERVANT—*duty to furnish safe place to work.* Held, that the platform in question in this case claimed to have caused the injury of the servant, was not so defective as to establish a failure by the master to exercise reasonable care to provide such servant with a reasonably safe place to work.

3. VERDICT—*when set aside as against the evidence.* Where it is apparent to the Appellate Court upon an examination of the record that the verdict of the jury upon a material issue is not supported by the evidence and that the plaintiff has failed to adduce evidence sufficient to sustain a verdict in his favor upon such issue, it becomes the duty of such court to set aside such verdict.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the May term, 1908. Reversed with finding of fact. Opinion filed November 17, 1908.

W. H. CROW and WILLIAM MUMFORD, for appellant; WINSTON, PAYNE, STRAWN & SHAW, of counsel.

WILLIAMS & WILLIAMS and A. C. WHITSON, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is an action on the case by appellee, as adminis-

trator of the estate of Fred W. Genrich, against appellant, to recover damages for wrongfully causing the death of his intestate. A trial in the Circuit Court of Pike county resulted in a verdict and judgment against appellant for \$5,000.

The declaration charges that appellant not regarding its duty in that behalf permitted its platform at its station at Nebo, Illinois, to remain in an unsafe condition, in that it was rough and uneven and composed of planks of uneven thickness; that the said planks had shrunk to such an extent from exposure to the weather or other causes as that said platform was lined with cracks between the said planks; that some of said planks were new and some were old and worn and were full of knots and nails projecting above the surface; that the deceased while engaged in the performance of his duties as brakeman, in the employ of appellant, was then and thereby exposed to unnecessary danger and liability, and that while alighting from a train of the appellant on the said platform, necessarily and unavoidably stumbled and fell thereon by reason of its defective condition, and rolled under the train, whereby he was killed, etc.

Of the many grounds urged by appellant for a reversal of the judgment in this case, we only deem it necessary to consider and determine the one relating to the question whether or not there is sufficient evidence in the record to support the charge of negligence alleged in the declaration. Considering the evidence in the record most favorable to appellee, it tends to show that on December 19, 1906, the deceased, who was then employed as a brakeman upon a freight train operated by appellant, was riding in the locomotive cab as the train approached Nebo from the west; that as the locomotive was nearing the east end of the station platform, and running at a speed of about seven miles an hour, the deceased alighted from the lower step of the cab onto the station platform, at a point about eighteen inches from the south edge of

the platform, and that as he did so the heel of his left foot slipped upon a knot in the surface of the platform, whereby he fell under the train and received the injuries which resulted in his death; that at the time of the accident the deceased was wearing a pair of new or recently repaired hob-nailed shoes; that the station platform was about 221 feet in length and sixteen feet in width, and was constructed of pine planks fourteen to sixteen feet in length, ten inches in width and two inches in thickness, nailed to sleepers or sills of the same dimensions; that from time to time as the old planks were broken, or became so worn as to be unfit for use, they were removed and new planks inserted; that when the platform was so repaired, a new plank, by reason of its greater thickness, if inserted next to an old plank, projected from one-half to three-fourths of an inch above the surface of such old plank; that the edges of the planks as laid in the platform at the place in question did not come in close contact, but were separated a distance of one-fourth to three-fourths of an inch; that the platform at the place in question was used by the general public in going to and from appellant's station, and was also used by appellant in loading and unloading freight; that the plank in question was somewhat worn, and the knot upon which the deceased slipped projected about one-eighth of an inch above the surrounding surface of the plank; that the plank next east of the plank in question was comparatively new and projected from one-half to three-fourths of an inch above the edge of the old plank, and was separated from the old plank a distance of from one-half to three-fourths of an inch.

It is conclusively established by the evidence that the immediate occasion of deceased's falling was the slipping of the heel of his hob-nailed shoe upon the smooth surface of the slightly projecting knot in the plank of the platform as deceased alighted thereon from the step of the locomotive cab.

Appellee advances several theories in an effort to

couple the space of from one-fourth to three-fourths of an inch between the planks, and the projection of the edge of the new plank above the edge of the old plank, together with the knot in the plank, as producing causes of the fall of the deceased, but such theories are purely conjectural, not supported by any substantive evidence in the record, or by any evidence tending to create a reasonable inference from which such theories can be properly or reasonably deduced. The proximate cause of the death of the deceased, so far as it related to any act of the appellant charged as negligence in the declaration, must, therefore, be held to have been the knot which appellant permitted to be and remain in the plank of the platform and to project one-eighth of an inch above the surrounding surface of such plank, as shown by the evidence.

Appellant cannot be held to be an insurer of the safety of the platform as a place where the deceased was required to work. In their brief and argument, counsel for appellee repeatedly make the statement that the duty devolving upon appellant was to construct and maintain a safe and suitable platform for the use of its servants in the performance of their regular duties. The duty of appellant in this regard is thus too broadly stated. It has been repeatedly held that the master is only bound to use reasonable care to furnish his servants with a reasonably safe place to work. *Armour v. Brazeau*, 191 Ill. 117; *Schilling Bros. Co. v. Smith*, 225 Ill. 74. The rule as thus stated was the measure of appellant's duty with respect to the platform in this case. Whether or not the master has performed the duty imposed upon him by law in a given case is ordinarily a question of fact for the jury, and the finding of the jury upon such issue is not to be lightly set aside. When, however, it is apparent to this court upon an examination of the record, that the verdict of the jury upon such issue is not supported by the evidence, and that the plaintiff has failed to adduce evidence sufficient to

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sustain a verdict in his favor upon such issue, it becomes the duty of this court to set aside such verdict. C., C., C. & St. L. Ry. Co. v. Alfred, 123 Ill. App. 477.

It is a matter of common knowledge that wooden planks ordinarily procurable for the construction of platforms, sidewalks and the like, are not free from knots, and it would be unreasonable to hold that the presence of knots in such planks constituted a failure to exercise reasonable care to construct a reasonably safe platform or sidewalk.

It is also a matter of common knowledge that the texture of a knot in a pine plank is much harder than that of the wood immediately surrounding it, and that the ordinary use of a platform or sidewalk necessarily tends to wear down the surface of a plank free from knots, to a greater extent than that portion of the surface where a knot exists. And it would be manifestly unreasonable to hold that the slight projection of one-eighth of an inch of such knot above the surface of the plank surrounding it, convicted a party permitting such condition to exist, of a failure to exercise reasonable care to maintain a reasonably safe platform, and constituted in itself actionable negligence. The evidence in this record together with all the inferences reasonable and proper to be drawn therefrom, compels us to the conclusion that the death of the deceased was caused by an accident unmingled with any actionable negligence upon the part of appellant.

The judgment of the Circuit Court will be reversed with a finding of fact to be incorporated in the judgment of this court.

Reversed with finding of fact.

Finding of fact: We find as an ultimate fact that appellant was not guilty of any actionable negligence which contributed to the death of appellee's intestate.

**W. K. Newcomb, Appellee, v. County of Champaign,
Appellant.**

1. **COUNTY COURTS**—*character of jurisdiction of.* County courts are not courts of general jurisdiction within the meaning of section 31 of the Counties Act.

2. **COUNTY COURTS**—*when without jurisdiction.* County courts have no jurisdiction with respect to counties sued in actions of *assumpsit*.

Assumpsit. Appeal from the County Court of Champaign county; the Hon. THOMAS J. ROTH, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

F. A. COGGESHALL, for appellant; F. M. & H. I. GREEN, of counsel.

RAY & DOBBINS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by W. K. Newcomb, appellee, against the county of Champaign, appellant, instituted in the County Court of Champaign county to recover for professional services in performing certain surgical operations upon Martha Smith and Henry Knell, poor persons, residents of said county. A trial by jury resulted in a verdict and judgment against appellant for \$75.

Appellant has filed its motion to reverse the judgment and to remand the cause with directions to the County Court to dismiss the suit, upon the ground that the County Court had no jurisdiction of the cause of action. Section 31 of Chapter 34 entitled "Counties," provides as follows: "All actions, local or transitory, against any county, may be commenced and prosecuted to final judgment in the Circuit Court, or any court of general jurisdiction, in the county against

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which the action is brought. Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant in such action resides."

In the County of Schuyler v. The County of Mercer, 4 Gilm. 20, the word "may" as used in this section of the statute was held to mean "must," or "shall," in conformity with the rule there announced that, in cases where the public interests and rights are concerned, and when the public or third persons have a claim *de jure* that the power should be exercised, the word *may* means *must* or *shall*. Brokaw v. Com'r. of Highways, 130 Ill. 482.

It is insisted by appellant in support of its motion that the County Court is not a court of general jurisdiction, within the meaning of the section of the statute in question. Prior to its amendment, that section of the statute provided that "All actions, local or transitory, against any county may be commenced and prosecuted to final judgment in the Circuit Court of the county against which the action is brought." By the amendment, the words "Or any court of general jurisdiction," were added after the words "Circuit Court." Section 7 of the Act relating to County Courts, provides that such courts "shall have concurrent jurisdiction with the Circuit Courts in all that class of cases wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed or the value of the property in controversy shall not exceed \$1,000, and concurrent jurisdiction in all cases of appeals from justices of the peace and police magistrates." Hurd's Stat. 1905, 618.

While it has been repeatedly held that the County Court is a court of limited jurisdiction, it has also been repeatedly held that it is not a court of inferior jurisdiction. Propst v. Meadows, 13 Ill. 157; Von Kettler v. Johnson, 57 Ill. 109; Barnett v. Wolf, 70 Ill. 76; Cassell v. Joseph, 184 Ill. 378. It has also been held that every presumption will be indulged in favor of

the regularity of the proceedings and in favor of the jurisdiction of county courts, and that county courts in this state are courts of general jurisdiction with respect to all matters coming within the scope of their jurisdiction as given by law. *Field v. Peeples*, 180 Ill. 376; *Bradley v. Drone*, 187 Ill. 175; *Commissioners of Highways v. Drainage District*, 207 Ill. 17. Whether the jurisdiction exercised by a County Court is to be designated or termed *general* is under the authorities cited, dependent wholly upon whether or not the jurisdiction so exercised is conferred upon that court by the legislature. It is to be observed that in every instance in which the County Court has been characterized a court of general jurisdiction, such characterization has been expressly limited to those cases in which it exercised jurisdiction under and by virtue of legislative authority. If no jurisdiction to act in a particular case is conferred upon the County Court by the legislature, the exercise of jurisdiction by such court in such case is unwarranted, and when so acting such court is not, in any sense, a court of general jurisdiction.

The case at bar is an action at law in *assumpsit*. Section 7 of the act relating to County Courts does not confer jurisdiction upon County Courts in all actions at law where the amount claimed or the value of the property in controversy does not exceed \$1,000, but its jurisdiction in that respect is limited to "that class of cases wherein justices of the peace now have or may hereafter have jurisdiction."

It is not pretended nor can it be successfully urged that a justice of the peace ever had or now has jurisdiction in any action local or transitory against a county. Justices of the peace having no such jurisdiction and the jurisdiction conferred by the statute upon county courts being limited to that class of cases wherein justices of the peace have jurisdiction, except as to the amount or the value of the property involved, it necessarily follows that no jurisdiction is

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conferred by the statute upon county courts in actions against counties, and with respect to its exercise of jurisdiction in such actions, the County Court cannot be said to be a court of general jurisdiction. In *Dandurand v. County of Kankakee*, 196 Ill. 537, where a suit was brought by the county of Kankakee, against one Dandurand, for board, lodging, etc., and the defendant filed a plea to the jurisdiction of the court, averring that the County Court did not have jurisdiction of a suit brought by the county, it was held that, while section 31 of the chapter entitled "Counties," restricts the courts in which suit *against* a county may be brought, said section contains no such restriction in cases of suits brought by a county, and that the county in bringing a suit may resort to any court having jurisdiction of the subject-matter in the county where the defendant resides. It is clearly inferable from the holding of the court in that case that if the suit had been against the county it would have been held that the County Court was without jurisdiction in the case.

The motion filed by appellant will be allowed, and the judgment of the County Court will be reversed and the cause remanded with directions to dismiss the suit for want of jurisdiction.

Reversed and remanded with directions.

James T. Conrad, Appellee, v. Springfield Consolidated Railway Company, Appellant.

1. ORDINANCES—*when observance of, cannot be waived by municipality.* An ordinance requiring a traction company to stretch and maintain suitable guard wires along and above its electric cables, represents the exercise by the municipality of its governmental or legislative powers, and in such an ordinance the public is invested with an interest, and the non-observance of such ordinance cannot be waived by such municipality; only legislative action can justify non-observance.

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2. **ORDINANCES**—*when requiring protection of electric cables not unreasonable.* All presumptions are in favor of the reasonableness of such an ordinance; the determination of its unreasonableness is a question of law for the court but a determination adverse to the ordinance would not be justified unless the want of necessity for the requirement in question was clearly made to appear.

3. **ORDINANCES**—*when violation of, absolute proof of negligence.* If it appears that an injury proximately results from the violation of a valid ordinance, proof of such ordinance and the violation thereof is not only *prima facie* but absolute proof of negligence.

4. **VERDICT**—*when not excessive.* A verdict for \$3000 rendered in an action on the case for personal injuries is not excessive where it appears that the plaintiff sustained severe and permanent injuries which have lessened his earning capacity and which are calculated to produce frequent attacks of pain and suffering.

Action in case for personal injuries. Appeal from the Circuit Court of Sangamon county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

WILSON, WARREN & CHILD, for appellant.

A. SALZENSTF'N and T. J. CONDON, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

The plaintiff, James T. Conrad, recovered a verdict against the Springfield Consolidated Railway Co., defendant and appellant here, for the sum of \$5,000 as damages for personal injuries. Upon the motion for a new trial plaintiff was required to remit \$2,000 from the verdict, and having entered such *remittitur*, the motion for a new trial was overruled and judgment was entered against defendant for \$3,000.

The declaration consists of three counts. The first two counts allege that on August 21, 1906, the defendant was operating a street railway on Monroe and Sixth streets in the city of Springfield, by means of electricity conducted through overhead wires; that it had acquired the right to operate said railway from its certain predecessor companies subject to the duty imposed upon said companies by the ordinances of the

city of Springfield, the terms and conditions of which ordinances the respective companies had expressly accepted and agreed to; that said ordinances provided that said companies should stretch and maintain suitable guard wires over and above the electric cables and overhead wires, at all points where said railway ran, where other wires belonging to other companies were suspended over and above such electric cables; that on the day aforesaid and for a long space of time prior thereto, the Central Union Telephone Company maintained wires at the intersection of said Sixth and Monroe streets, and thereby it became the duty of the defendant to maintain a suitable guard wire over its cables at said point; that defendant neglected and failed to do so, whereby plaintiff, in the course of his duty as an employe of the telephone company, in stretching and taking down wires of the telephone company crossing over the electric cables of the defendant at said point, while in the exercise of due care and caution for his own safety, by reason of one of the said telephone wires breaking and falling upon the electric cable of defendant, a current of electricity was conveyed into plaintiff and he was thereby injured.

The amended third count alleges that defendant was then operating an electric street railway in said city of Springfield, and that it thereby became and was the duty of defendant to exercise reasonable care to confine the electricity carried in its cables to its own cable and premises, and to prevent the same escaping or coming into contact with the wires of other companies suspended over its said cables at the place aforesaid; that defendant then well knew that the telephone company had for twenty years prior thereto, maintained wires over and above its cable and that thereby it became the duty of defendant to maintain a guard wire above its cable or take some other adequate means, by insulation or otherwise, to prevent its electric current coming in contact with the wires of the telephone company which might break, or in the handling by em-

ployes of the telephone company, might slip or fall, or otherwise come in contact with the electric current in its cable; that defendant not regarding its duty in that behalf, did not maintain any guard wires or take any other means to prevent its electric current from escaping and coming into contact with the wires of the telephone company, which might fall or break as aforesaid; that plaintiff, while in the performance of his duty as an employe of the telephone company, in handling and removing its wires crossing those of the defendant, and while in the exercise of due care and caution for his own safety, one of said wires broke and came in contact with the electric current in defendant's cable and thence into the body of the plaintiff, etc.

On August 21, 1906, the plaintiff was employed as a lineman by the Central Union Telephone Company. He was 36 years of age and had had considerable experience as a lineman and electrician. On that day he was engaged in taking down and putting up telephone wires, and at the time of his injury was standing on a telephone pole at the corner of Sixth and Monroe streets in the city of Springfield, engaged in removing an old telephone wire, which broke while he was handling the same, and was thus caused to fall upon a wire carrying a high voltage of electricity which was thereby communicated to his person, causing the injury complained of. The evidence tends to show that the pole upon which plaintiff was then standing was about sixty-five feet in height and was equipped with eight cross arms upon which a large number of wires were fastened; that the lowest cross-arm near which plaintiff was then standing was about forty feet from the ground; that an uninsulated trolley wire of the defendant was suspended over its track about twenty feet above the ground and below the wires of the telephone company; that on the east and west sides of Sixth street about thirty-five feet from the ground and below the telephone wires, were suspended lines of

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insulated electric light and power wires. Plaintiff testified that in doing the work in hand it was necessary for him to be right among the telephone wires suspended upon the pole and the messenger wires upon which the cables were hung; that just before he was injured he got hold of an old telephone wire for the purpose of pulling it out, and as he did so it broke off and fell down and wrapped around the trolley wire and looped back up and charged the messenger wire which was grounded, thus communicating a current of electricity to and through his person.

There was introduced in evidence an ordinance of the city of Springfield, passed January 17, 1890, approved January 20, 1890, granting to the Citizens Street Railway Company, a predecessor of the defendant, the right to construct and operate an electric railway over certain streets in said city, including Sixth and Monroe streets. There was also introduced in evidence an acceptance of said ordinance by the Citizens Street Railway Co., under date of February 20, 1890. Section 7 of the ordinance in question provides, as follows:

“That it is the duty of said company to stretch and maintain a suitable guard wire along and above its electric cables and over wires at all points within the city where other wires belonging to other companies are suspended over or above said electric cables; the same may be extended along the whole line of said railway when required by the council. And in case of wilful violation of this section said company shall be subject to a fine of not exceeding two hundred dollars for every day.”

It is conceded by appellant that it had failed to comply with the provisions of said ordinance with respect to guard wires, and that no such guard wire was stretched and maintained by it over its trolley wire at the place in question.

It is first urged on behalf of appellant that a municipal corporation performs two distinct functions; one,

legislative, whereby it may enact ordinances prescribing rules of conduct within its territorial limits, and the other proprietary, whereby it deals with the property rights and interests which it holds in trust for the public; that the ordinance in question, or the section of such ordinance here involved, is properly referable to the function of the municipal corporation in its proprietary capacity and not in its legislative capacity, and that the court, therefore, erred in excluding certain evidence offered by appellant, which it is claimed tended to show that when the ordinance was adopted as a contract between the parties it was supposed that guard wires would afford protection to the public using the streets, but that practical experience in the operation of electric railways had demonstrated that the presence of guard wires was a menace to the safety of the public, and for that reason the parties to the contract had waived the performance of the particular provision relating to guard wires. The record in this case with respect to the the question sought to be raised shows that upon the cross examination of assistant city electrician W. M. Childs, called as a witness on behalf of appellee, counsel for appellant asked the following question: "Now, during the time you were in the city electrician's office or had anything to do with it, did you ever request the Springfield Railway Company to put up guard wires?" Upon objection thereto by counsel for appellee, counsel for appellant stated to the court: "We propose to show that this condition of this ordinance was waived by the city and that the city never required it to be enforced."

The trial court held that the public had an interest in the ordinance and that the provisions of the ordinance in that respect could not be waived by mere non-action, and sustained the objection to the question. A like question propounded to the city electrician, J. B. Valentine, was objected to by counsel for appellee and the objection was sustained.

Without entering into an extended discussion of the well-recognized distinction suggested by counsel for appellant between the legislative and proprietary functions of a municipal corporation, we are of opinion that section 7 of the ordinance introduced in evidence should be held to be an act of the municipality, legislative in its character. In *Dillon on Municipal Corporations*, 4 Ed., Vol. 1, sec 66, cited by appellant, it is said with reference to such corporations: "These, as ordinarily constituted possess a double character; the one governmental, legislative or public; the other, in a sense, proprietary or private. * * * In its governmental or public character, the corporation is made, by the state, one of its instruments or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. * * * But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with government or the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual."

It requires no argument to determine that the provision of the ordinance in question requiring the appellant to stretch and maintain suitable guard wires along and above its electric cables was adopted by the municipality in its governmental or legislative capacity, and in the discharge of a duty imposed upon it for the benefit and safety of the public generally. An ordinance containing a similar provision, was held, in *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, to have been adopted by the city of Chicago in its legislative or governmental capacity by virtue of the powers delegated by the state, and to have the force and power of a statute. Appellant and its predecessor accepted the ordinance without qualification, and having availed themselves of the benefits of the same, appellant is estopped from repudiating its condition. *Commonwealth Electric Co. v. Rose, supra.*

Conrad v. Springfield Consolidated Ry. Co., 145 App. 564.

The ordinance having been adopted by the municipality in its legislative capacity may not be nullified, suspended or repealed by it otherwise than by like legislative action. *City of Paxton v. Bogardus*, 201 Ill. 628; *B. & N. Ry. E. & H. Co. v. Bloomington*, 123 Ill. App. 639. It would be nothing short of an absurdity to hold that in the absence of a request by an accredited official of the municipality to comply with the provisions of an ordinance, the party bound to comply therewith would be excused from so doing, or that a failure to make such request would operate as a waiver by the municipality of the provisions of the ordinance, or that the failure of a municipality to enforce an ordinance operated to nullify or repeal it. We conclude that the trial court did not err in sustaining the objections to the questions propounded to the witnesses Childs and Valentine.

Whether the ordinance in question was reasonable or unreasonable in respect to the provision with reference to guard wires, was a question of law for the court. All the presumptions are in favor of the reasonableness of the ordinance as a legitimate exercise of police power, and the court would not be justified in holding the ordinance unreasonable unless the want of necessity for the requirement in question as a measure for the public safety was clearly made to appear. The ordinance could not be held to be unreasonable unless it was manifest that the discretion reposed in the municipal authorities had been abused in an arbitrary manner. *C., R. I. & P. Ry. Co. v. Steckman*, 224 Ill. 500. No such showing was made to the trial court by appellant in the case at bar. The evidence of the witness Pierce as set forth in an affidavit in support of a motion for continuance was only offered by appellant in support of its contention that the ordinance was unreasonable. Upon that issue the evidence was properly excluded from the jury, and appellant is not in a position to urge that the evidence of such witness was competent to go to the jury under the third count

of the declaration, which alleged common law negligence.

The fourth instruction given to the jury at the instance of appellee is as follows:

“The court instructs the jury that under the ordinance of the city of Springfield, offered and admitted in evidence in this case, it became and was the duty of the defendant to have guard wires over its trolley wire at all places where such trolley wire was crossed by the wires of other companies and if you believe from the evidence in this case that at Sixth and Monroe streets, where plaintiff was injured, other companies long previous to the day the plaintiff was injured, had wires over defendant’s trolley wire, then it was and became the duty of defendant to have and maintain guard wires at such place; and if you further believe from the evidence that the defendant failed so to do and plaintiff was injured in the manner charged in the first two counts of his declaration, or in either of them, by a wire of the Central Union Telephone Company, which he was then and there attempting to remove, breaking and falling on defendant’s unguarded trolley wire at said place, whereby the current from said trolley wire was transmitted against the person of plaintiff, and plaintiff at and before such injury was using ordinary care and caution for his own safety, then you will find a verdict for the plaintiff.”

It is urged that this instruction is erroneous, in that it states that the duty of the appellant to maintain guard wires is absolute by virtue of the ordinance, and that the jury were thereby advised that the violation of said ordinance constituted in the case at bar, negligence as a matter of law; that at most the court should have instructed the jury that the violation of said ordinance by appellant, constituted merely *prima facie* evidence of negligence. The duty of appellant to comply with the provisions of the ordinance was absolute and it was not error so to charge the jury. It is commonly said that the violation of a statute or of a city ordinance, where the ordinance is such a one as the city is authorized by its charter or by the

statute to adopt, is *prima facie* evidence of negligence. U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531. *Prima facie* evidence means evidence which is sufficient to establish the fact unless rebutted, the expression *prima facie* being used as an antonym of conclusive. The duty of the appellant under the ordinance being absolute proof of the violation of such duty in the case at bar became conclusive evidence of the negligence of appellant, if it appeared from a preponderance of the evidence that the violation of said ordinance was the proximate cause of the injury to appellee. The question of proximate cause was submitted to the jury by the instruction as a question of fact, and the jury were thereby only authorized to return a verdict for appellee, if, upon the issue of proximate cause presented by the instruction, they found against the appellant.

In Shoninger Co. v. Mann, 219 Ill. 242, it was held that the doctrine of assumed risk rests upon and grows out of the contractual relation which exists between master and servant. The question of assumed risk is not, therefore, involved in this case, and appellant cannot avoid liability upon the ground that appellee assumed the risk.

Whether or not appellee was in the exercise of due care for his own safety immediately before and at the time of his injury was a question of fact for the jury, and we are not prepared to say upon the evidence in the record, that the finding of the jury upon that issue was clearly wrong. While appellant introduced evidence tending to show that a lineman of ordinary experience, before attempting to remove telephone or other wires suspended above a trolley wire should place himself in such a position on the pole upon which he was at work as that his body would not come in contact with other wires which were grounded, appellee testified that he could not avoid contact with such other wires in performing the work he was then engaged in, and that he did not notice the absence of a

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guard wire above the trolley wire. The evidence of appellee in this respect stands uncontradicted.

Appellant sought to show that the current of electricity which injured appellee was transmitted by an electric light and power wire, and not by appellant's trolley wire. Appellee testified positively that he saw the broken wire which communicated the current of electricity into his person lying upon the trolley wire at the instant he received the shock. The evidence of the witness Frank Ryan tends to corroborate appellee in this particular. There is also evidence tending to show that the voltage in the electric light and power wire was so great, that if the telephone wire which appellee was handling had come in contact with an uninsulated portion of it, appellee would have been killed almost instantly. Furthermore, the evidence tends to show that the insulation on the electric light and power wire was intact.

It is lastly urged that the damages awarded to appellee are excessive. The evidence tends to show that appellee sustained severe permanent injuries which have lessened his earning capacity, and which are calculated to produce frequent attacks of pain and suffering. We are unable to say that the judgment for \$3,000 is disproportionate to the injuries received.

There is no error in the record prejudicial to appellant and the judgment of the Circuit Court will be affirmed.

Affirmed.

Gates Strawn et al., Executors, Appellants, v. The Trustees of Jacksonville Female Academy et al., Appellees.

APPEALS AND ERRORS—when freehold involved. In a proceeding to construe a will a freehold is involved if the determination of the cause will result in the loss of a freehold by one of the parties in interest.

Strawn v. Trustees of Jacksonville Female Academy, 145 App. 574.

Bill in equity. Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the May term, 1908. Transferred to Supreme Court. Opinion filed November 17, 1908.

DENT & JACKSON, for appellant.

J. B. LIPPINCOTT, BELLATIE & BARNER and B. W. MILLS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a bill in equity by Gates Strawn and Edward P. Kirby, executors and trustees under the last will and testament of Phebe G. Strawn, deceased, appellants, against the legatees and devisees under the will of said deceased, appellees, to obtain a construction of the tenth and twelfth clauses of said will and the fourth clause of the codicil to said will, which said several clauses are as follows:

“X

“I give and bequeath to the Trustees of the Jacksonville Female Academy the sum of ten thousand dollars (\$10,000), the same to be kept by said trustees as a perpetual fund, and to be loaned upon good real estate security, and only the interest and income of said fund to be used and expended; said income to be used and expended in maintaining a high grade school for the education of young women.

“XII

“I give, devise and bequeath to my executors, hereinafter named as trustees, the north two-thirds ($\frac{2}{3}$) of the homestead property on which I now reside, and more particularly described as Lot one (1) in Block 17 (17) in the city Addition to the City of Jacksonville. To have and to hold the same upon the trusts following, that is to say:

“First, Upon Trust: To give to my three children, Julius E. Strawn, Gates Strawn and David Strawn, the use and occupation of said premises as a home, for and

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during their joint lives, and the lives of the survivors or survivor of them, they, the survivors or survivor of them, during said occupation, well and duly paying all taxes and special assessments thereon, and keeping the buildings and other improvements thereon in good repair; and keeping all buildings thereon insured in their fair insurance value, for the benefit of all parties interested therein. In the event my said children or the survivors of them shall be unable to agree in a joint occupation of said premises, then the occupancy thereof shall be given and awarded by my executors to those or that one of my said children who will pay to the other or others the largest sum for the right of such occupancy.

"I expressly will and direct that the words occupation, occupancy and right of occupancy, hereinbefore mentioned shall not include the right to rent said premises except during temporary absence, my intention being only to provide for my said children a home in the house which I erected and have occupied as a home myself.

"Second, Upon Trust: Whenever said real estate shall no longer be occupied as a home by any of my three children above named, either because of the death of the survivor or because of their abandonment of right to the occupancy thereof, then to convey the said premises in fee simple, subject to the conditions and limitations hereinafter contained, to the Trustees of the Jacksonville Female Academy, in Jacksonville, Illinois, to be held, used and enjoyed by the said Trustees as a site for an art gallery and school of art, to be known and designated as "The Strawn Art School and Gallery;" such school and art gallery to be under the management and control of said Trustees as an annex, and to be used in connection with the school known as the Jacksonville Female Academy. The deed of conveyance to said Trustees shall contain a provision or condition that whenever the said premises shall cease, for a period of three (3) consecutive years, to be used as a site for such art school and art gallery, then all the rights of the said Trustees under and by virtue of said deed of conveyance shall cease

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and determine, and the title to said premises shall thereupon revert to my executors, or the survivor of them, and the said premises shall then be sold by them, or him at public auction, upon such terms as to them or him shall seem best, and the proceeds arising from said sale shall then be divided and distributed by my executors, or the survivor of them, equally, between the Trustees of Illinois College, the Trustees of the Jacksonville Female Academy, the Trustees of the State Street Presbyterian Church in Jacksonville, and the Association for Works of Mercy of the Evangelical Lutheran Church in Illinois; all moneys so paid over to said legatees to be kept and maintained as a perpetual fund, and the interest and income to be used as hereinbefore prescribed for the expenditure of the interest and income of the bequests to said legatees. If neither of my executors be living at the time of such abandonment or surrender of said premises, then the court shall appoint a Trustee to carry into effect this provision of my will.

“IV

“Whereas, in and by my said will and the Twelfth (12th) clause thereof, I did give, devise and bequeath to my executors as Trustees, the north two-thirds ($\frac{2}{3}$) of my homestead property on which I now reside known and described as Lot One (1) in Block Seventeen (17) in the City Addition to the City of Jacksonville, and I now believe that the whole of said property would be better adapted than a part thereof for the uses and trusts upon which said property was devised to said Trustees, I do now give, devise and bequeath to my executors in said will named, as Trustees, all of my said homestead property, being Lot One (1) in Block Seventeen (17) in the City Addition to the City of Jacksonville, in Morgan County, Illinois, to have and to hold the same upon the same trusts and conditions upon which the said Trustees were to have and to hold the north two-thirds ($\frac{2}{3}$) of said homestead property, as set forth in the Twelfth (12th) clause of my said will.”

The claim of appellant to the interposition of a court of equity is mainly predicated upon the provisions of

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a contract entered into between the Trustees of the Jacksonville Female Academy and the Trustees of Illinois College, and a conveyance by the former to the latter made in pursuance of such contract, whereby it is alleged that the said Trustees of the Jacksonville Female Academy had become permanently disabled from complying with the conditions attached by said will to the vesting of the legacy and devise here involved, and that said legacy and devise had lapsed and became a portion of the residuum of the estate of the testatrix. It is manifest that if the devise of the real estate known as the homestead property should be held to have lapsed, it would result in the loss to the Trustees of the Jacksonville Female Academy of a freehold estate. The devise is to appellants as executors and trustees of the will with directions to convey said real estate to the Trustees of the Jacksonville Female Academy, upon the termination of the right of certain children of the testatrix to use and occupy the same during their lives and the life of the survivor and not to sell the same and pay the proceeds to the trustees of said academy.

This court is without jurisdiction to consider and determine the question involved, and the clerk of this court is, therefore, directed to transmit the transcript of the record and files in the case to the clerk of the Supreme Court, to which court this cause is transferred.

Transferred to Supreme Court.

Willis W. Harmon, Appellee, v. F. W. Niergarth, Appellant.

ARBITRATION—*what essential to valid award.* An award to be valid and binding as such must embrace all matters submitted, unless such matters are withdrawn by agreement of the parties, but this rule cannot be invoked to avoid an award where the finding of the arbitrator upon one of the issues submitted is such that it precludes the necessity of the finding upon another issue.

Harmon v. Niergarth, 145 App. 578.

Assumpsit. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

FRANK B. McKENNAN, for appellant; WELTY, STERLING & WHITMORE, of counsel.

A. E. DE MANGE and R. C. DE MANGE, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit in assumpsit by appellee, Willis W. Harmon, against the appellant, F. W. Niergarth, which, upon a trial by the court, without a jury, resulted in a finding and judgment against appellant for \$382.35.

In the year 1905, appellee, a contractor, constructed for appellant a dwelling house upon the completion of which, the surviving architect, George H. Miller, accepted the same under the contract, and on December 27, 1905, issued to appellee a final certificate of acceptance and for the payment by appellant to appellee for \$1393. Appellant moved into the dwelling house before making the final payment under the architect's certificate and shortly thereafter discovered some defects therein in material or workmanship and made complaint in respect thereto to the architect Miller. On June 23, 1906, Miller notified appellee in writing of the defects existing in the building and informed appellee that the balance of \$593 still remaining unpaid on the original contract price, would be withheld until the defects were remedied. Appellee claiming that the defects alleged to exist in the building were due to defective materials furnished by his subcontractor, the Darlington Lumber Co., brought suit against said lumber company to recover the damages alleged to have resulted from the withholding by appellant of the balance of the contract price. The Darlington Lumber Co., being surety for appellee upon his bond to protect appellant under the original contract for construction, and being desirous of settling the suit instituted against it by appellee, and to

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secure the sum claimed to be due to it from appellee for materials furnished, and appellee desiring to effect a settlement of the matter in controversy, together with appellant, on April 1, 1907, executed a tri-partite agreement. This agreement provided in substance that the defects in the building as therein indicated should be remedied by the Darlington Lumber Co.; that thereafter said Lumber Company should receive out of the balance of the original contract price withheld by appellant, the amount due said Lumber Company from appellee for material furnished for the construction of the house together with reasonable compensation for any defects cured resulting from defective workmanship, the balance, if any, to be paid to appellee; that appellant should retain from said balance the sum of \$121.95 as payment for groceries purchased from him by appellee; that a fulfillment of the agreement should stand as a settlement of the suit brought by appellee against the Lumber Company which suit should be dismissed at the cost of said Lumber Company; that Miller, the architect, should be superintendent of the work of remedying the defects and should determine what defects were due to defective workmanship, the amount to be allowed to the Lumber Company for remedying the defects of workmanship, and whether the repairs made by the Lumber Company overcame the defects and rendered the building complete according to the terms of the original contract.

It was further thereby stipulated and agreed that the decision of Miller upon the matters submitted to his determination should be final and binding upon the respective parties thereto. Subsequent to the execution of this agreement the Lumber Company remedied the defects in the building to the satisfaction of appellant and the architect Miller. On October 15, 1907, Miller, as architect, acting under the tri-party submission to arbitration, made his award, wherein he found in substance that the defects complained of in the con-

struction of the building had been remedied; that out of the balance (\$593) due from appellant to appellee under the contract, there should be deducted \$121.95 due from appellee to appellant for a grocery account and the remainder be paid by appellant to appellee upon the contract. Upon the refusal of appellant to pay to appellee the amount claimed to be due him under the contract, after deducting the amount due from appellee to the lumber company, for material, appellee brought this suit to recover the same.

It is not controverted in the record that the amount due from appellee to the Lumber Company for material furnished under the contract was \$121.90.

It is urged that the court improperly permitted appellee to introduce evidence for the purpose of establishing the amount due him under the contract after deducting the amount due from him to the Lumber Company. If we understand the ground of appellant's contention in this regard, it is that the amount in question should have been determined by the architect in his award, and that the failure of the architect to determine said amount rendered the award void.

It is undoubtedly the rule that an award to be valid and binding, as such, must embrace all matters submitted, unless such matters are withdrawn by agreement of the parties (*Steere v. Brownwell*, 113 Ill. 415), but this rule cannot be invoked to avoid an award where the finding of the arbitrator upon one of the issues submitted is such that it precludes the necessity of a finding upon another issue. The submission in the case at bar only required the arbitrator to fix the price to be allowed to and charged by the Lumber Company in and about correcting defects in the building in the event that such defects were due to defective workmanship. If the defects were due to defective materials furnished by the Lumber Company, it was bound to remedy such defects at its own cost and expense. A finding therefore that the defects were due to defective material and not to defective workmanship precluded

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the necessity of a finding fixing the price to be allowed to and charged by the Lumber Company for correcting such defects.

As the trial was before the court without a jury there was no impropriety in admitting in evidence the statement of the account designated as "Exhibit C," supported as it was by the testimony of appellee as to its correctness. Appellee was entitled to a recovery upon the award and the judgment of the Circuit Court will be affirmed.

Affirmed.

U. A. Brady et al., Appellees, v. James H. Koontz, Appellant.

PARTIES—*when joinder improper.* The joinder of several parties as plaintiffs is improper if they have no joint interest in the transaction with respect to which the action is brought.

Action commenced before justice of the peace. Appeal from the County Court of Shelby county; the Hon. CALVIN GREEN, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

CHAFEE & CHEW, for appellant.

F. E. LATCH, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

The appellees, U. A. Brady and Dora Brady, his wife, recovered a verdict and judgment against the appellant, James H. Koontz, in the County Court of Shelby county, for \$24.91 for goods, wares and merchandise sold and for labor performed by said appellees to and for appellant.

The judgment must be reversed and the cause remanded, primarily, because there is no evidence in the case which authorizes a recovery by the appellees

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jointly. The evidence in the record discloses that appellee, U. A. Brady, at the time of the transactions in question, was engaged in the business of general merchandising, and sold to appellant flour, coffee, corn, knives, plow shares, horse collars and the like, and that appellee, Dora Brady, in addition to performing the ordinary duties of a housewife, did some work in the way of sewing and making women's garments, and made skirts, waists and dresses for the children of appellant. It is not questioned but that a husband and wife may form a partnership and transact business as partners, but such relation does not exist merely by virtue of the marriage of the parties, and can only be created by special contract.

No contract partnership relation is shown to have existed between appellees. It is merely claimed on their behalf that each was interested in the work and business of the other by virtue of their relation as husband and wife. In this state of the record it is clear that appellees had no joint interest or right respecting the transactions involved as authorized their joinder as plaintiffs in the action.

The judgment of the County Court will be reversed and the cause remanded.

Reversed and remanded.

John Heffernan, Appellee, v. Sylvanus B. Lloyd, Appellant.

1. *REMITTITUR—when does not cure excessive verdict.* A verdict clearly excessive will not always be cured by permitting a remittitur.

2. *EVIDENCE—when threats competent; when not.* Evidence of threats made by one party to an altercation against the other are only competent when the party alleged to have made the threats makes some hostile demonstration prior to being attacked by the other party.

Action in case for personal injuries. Appeal from the Circuit Court of Montgomery county; the Hon. SAMUEL L. DWIGHT, Judge,

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presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

LANE & COOPER and EDWARD C. KNOTTS, for appellant.

JETT & KINDER and GRAHAM & GRAHAM, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee, John Heffernan, recovered a verdict and judgment against appellant, Sylvanus B. Lloyd, in the Circuit Court of Montgomery county for \$2000 for damages for personal injuries, alleged to have been sustained as the result of an assault by appellant upon appellee with a spade.

On September 3, 1907, and for some time prior thereto appellant was operating a brick and tile factory in the village of Farmersville and appellee was employed by appellant in shoveling clay from a pit into the hopper of a machine which ground and moulded it into tile, and was receiving for his services \$25 a month and board and lodging in appellant's family, such board and lodging being estimated to be worth \$3.50 per week. In detailing his version of the altercation with appellant, appellee testified that between nine and ten o'clock in the forenoon of September 3, 1907, while he was at work in the pit shoveling clay into the hopper of the tile machine, appellant came there and charged him with having annoyed and quarreled with the engineer and upon his denying the accusation appellant said he had been so informed by some of the boys; that he reiterated his denial and said to appellant "The best thing you can do is to give me my time," and that he then dropped the spade or struck it in the ground; that appellant picked up the spade and ordered him to get out and then struck him on the side with the blade of the spade breaking the wooden handle; that when appellant struck him he threw up his left hand to protect his

head; that after the spade was broken and while appellant was holding a portion of the handle he again ordered him to get out or he would kill him; that he then got out of the pit and started to go to the house to get his clothes when appellant called him back and said "I let my temper get away with me—come back and go to work;" that he told appellant he didn't want anything to do with him and only wanted his time.

The testimony of appellee is substantially corroborated by the witnesses Irving Clowe and Charles McCarthy.

The evidence tends to show that while the pain which appellee suffered immediately following the assault was comparatively trifling he then consulted a physician who made an examination and discovered a slight red spot over the lateral aspect of the chest midway between the hip bone and the armpit and applied adhesive bandages from the breast-bone to the backbone and over the spot; that for three or four weeks thereafter appellee suffered increasing pain accompanied by sinking spells and hemorrhages from the nose and mouth and was then taken to a hospital and submitted to an operation for an injury to his spleen; that the operation disclosed that the spleen was ruptured on its anterior border and that there was considerable free blood in the abdominal cavity; that appellee was obliged to remain in the hospital eight weeks and a half and that after leaving the hospital he regained his strength very slowly and continued to suffer pain in his breast and stomach; that at the time of the trial of the case in January, 1908, about nine weeks after he was discharged from the hospital, he was very weak, had difficulty in breathing, was able to speak but little above a whisper, could not walk more than two blocks, was troubled with sleeplessness and was unable to do any work. Appellant testified that Peterson, his engineer, had complained to him of the treatment he had received from appellee; that he stepped down to where appellee was spading and said "I wish you

would let Mr. Peterson alone, you are making a great deal of trouble with him and you must stop it; you do your work and let Mr. Peterson do his and you will get along better;" that after some further conversation with appellee as to the cause of the trouble between the latter and Peterson, appellee set his spade in the dirt and he reached over and took it; that he told appellee if the latter could not work agreeably he would have to get out and that he raised the spade and ordered appellee to get out; that appellee raised up his left arm in a striking attitude and he gave him a bat on the side; that appellee had made threats against him which had been communicated to him by Peterson.

Thompson, a witness called on behalf of appellant, testified that appellee had assumed an attitude as if to strike appellant just before the latter hit appellee with the spade.

It is insisted on behalf of appellant that the verdict is against the manifest weight of the evidence upon three issues of fact involved in the case; first, whether appellant struck appellee in self-defense using no more force than was reasonably necessary; second, whether appellee's spleen was ruptured by the blow; and third, in the amount of damages awarded to appellee. We are persuaded that the evidence does not warrant a finding that appellant struck appellee in self-defense. Much was made upon the trial of certain threats alleged to have been made by appellee against appellant, which, it is claimed, were communicated to appellant shortly before his altercation with appellee. The evidence does not disclose that such threats, if made and communicated to appellant, had any influence on the latter when he struck appellee. There is not a scintilla of evidence in the record tending to show that either of the parties made any reference whatever to such alleged threats upon the occasion in question. It is not claimed that appellee then said anything indicative of a purpose on his part to assault appellant,

and it is inconceivable that if the threats alleged to have been made prior to that time by appellee against appellant then influenced in any degree the conduct of the latter in striking appellee, appellant would have maintained a sphinxlike silence with reference thereto. That appellee's spleen was in fact ruptured by the blow with the spade is the only conclusion reasonably deducible from the evidence in the case. The only evidence offered on behalf of appellant which tends to support his contention that appellee's spleen was not ruptured by the blow is the opinion of two physicians who testified as experts that if appellee's spleen had been ruptured by the blow death would have ensued almost immediately, and that the theory of appellee was contradicted by their experience and the literature of the profession upon the subject. That appellee's spleen was ruptured and that that condition was produced by a traumatic injury does not, under the evidence, admit a doubt.

The evidence offered on behalf of appellee excludes any hypothesis upon which a finding might be predicated that his spleen was ruptured by some cause other than the blow inflicted by appellant.

The amount of damages awarded to appellee we regard as excessive under the evidence, even if it be conceded that the jury were warranted in assessing punitive damages. If there was evidence in the record tending to show that appellee's physical condition at the time of the trial was, or was likely to be, permanent, or would so continue indefinitely, the verdict and judgment for \$2000 might, with propriety, be sustained, but in the absence of any such evidence, it is clearly excessive and in this case, even if the record was otherwise free from error, we should hesitate to attempt a correction in that regard by requiring a *remittitur*.

It is urged that the court erred in not permitting appellant to state what threats against him were communicated to him as having been made by appellee a short time before the difficulty. Evidence of threats

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made by one party to an altercation against the other are only competent when the party alleged to have made the threats makes some hostile demonstration prior to being attacked by the other party. Cummins v. Crawford, 88 Ill. 312; Forbes v. Snyder, 94 Ill. 374. The only evidence in the case which offered any pretense to appellant to prove that appellee had threatened him with personal violence was the evidence of appellant and the witness Thompson tending to show that appellee assumed an attitude as if to strike appellant with his fist before appellant struck appellee with the spade. The court permitted appellant to testify that alleged threats against him by appellee had been communicated to him prior to the altercation, but refused to permit appellant to state the character of the alleged threats which had been communicated to him. The character of the alleged threats was fully shown by the testimony of other witnesses, but if evidence of alleged threats was competent it was proper for appellant to state what threats had been communicated to him. Where evidence of alleged threats is competent the character of such threats as communicated to the party acting with reference thereto should be permitted to be shown for the purpose of enabling the jury to determine the conduct of the party as influenced by such threats.

Appellant's criticism on the rulings of the court upon the instructions are such as can be readily obviated upon another trial of the case and do not require consideration in detail.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

**Fred B. Patchin, Appellee, v. Lewis Crossland et al.,
Appellants.**

1. CHATTEL MORTGAGES—*when unrecorded, valid.* An unrecorded chattel mortgage is valid as between the parties and likewise as between the mortgagee and one unlawfully taking possession from the mortgagor.

2. CHATTEL MORTGAGES—*when parol evidence not competent to aid.* In the absence of a latent ambiguity in the description of the property mentioned in a chattel mortgage, parol evidence is not admissible for the purpose of showing that other property not answering such description was intended to be included in such mortgage.

3. VERDICT—*when not disturbed as against the evidence.* A verdict will not be set aside on review as against the evidence unless clearly and manifestly so.

4. INSTRUCTIONS—*when containing abstract proposition of law will not reverse.* An instruction which contains a correct abstract proposition of law will not reverse unless misleading.

Replevin. Appeal from the Circuit Court of Hancock county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

S. L. McCROBY and WILLIAM H. HARTZELL, for appellants.

EDWIN S. COOMBS and APOLLOS W. O'HARRA, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit in replevin by Fred B. Patchin, appellee, against Lewis Crossland and Albert Naegelin, appellants, to recover possession of one sorrel horse, about eleven years of age, blind in one eye, having solid light sorrel color, and one chestnut sorrel mare about twelve years of age, having a white left hind foot, with gray strip in face. A trial in the circuit court of Hancock county resulted in a verdict and judgment in favor of appellee.

Patchin v. Crossland, 145 App. 589.

On April 9, 1906, one F. A. Bachman purchased of appellee two horses answering the description of the horses in controversy, and in payment therefor executed to appellee a note for \$208, payable January 1, 1907, and to secure the payment of said note, also executed a chattel mortgage upon said horses by the same description. On April 13, 1906, the said Bachman and wife gave to the Basco Bank, conducted by appellants and others, as partners, their note for \$640 payable January 1, 1907, and to secure the payment of said note executed their chattel mortgage covering certain horses, as follows: "One span of gray mares, eight and nine years old, respectively, in foal, weight about twenty-eight hundred pounds; one bay horse nine years old, weight about eleven hundred pounds, white streak in face; one black mare eight years old, weight about eleven hundred pounds, in foal; one bay team (one mare, one horse) four and five years old, respectively, weight about twenty-eight hundred pounds; one brown mare seven years old, in foal."

On June 20, 1906, for some reason not disclosed by the evidence, the bank determined to foreclose its mortgage, and Bachman, in order to save the expense of such foreclosure, was induced to execute to the bank a bill of sale of the property therein described, and by the like description. Upon the same day appellants acting for the bank went to the home of Bachman for the purpose of taking possession of the property described in the bill of sale and there took possession of the two horses described in the chattel mortgage to appellee. On the day following, appellee filed his chattel mortgage for record and thereafter instituted this suit in replevin, claiming the horses in controversy under and by virtue of his said mortgage.

Appellants acting for the bank assert their right to the possession of the property upon two grounds: First, that Bachman in fact intended that the two horses in question should be included in the chattel mortgage and bill of sale to the bank, and were so

included therein, although improperly described; and second, that Bachman voluntarily surrendered the said horses to appellants under the bill of sale in payment of his indebtedness to the bank secured by the chattel mortgage.

The chattel mortgage of appellee as between himself and the mortgagor, Bachman, constituted a valid lien upon the property therein described, although it was not filed for record, but it had no validity as against a third party asserting a rightful claim thereto through or under the mortgagor. The mortgage being valid as between appellee and Bachman it was likewise valid as between appellee and one taking the property from Bachman unlawfully.

There is no latent ambiguity in the description of the property mentioned in the chattel mortgage and bill of sale given by Bachman to the bank, and parol evidence was not admissible for the purpose of showing that other property not answering such description was intended to be included in said mortgage and bill of sale. *Hutton v. Arnett*, 51 Ill. 198.

Upon the issue as to whether or not Bachman voluntarily surrendered the property to appellants under the bill of sale in payment of his indebtedness to the bank, the evidence is sharply conflicting. While a consideration of such evidence as it appears in the record inclines us to the conclusion that it would better support a verdict in favor of appellants, we are not prepared to hold that the verdict as returned is so manifestly against the weight of the evidence as to justify us in setting it aside. Bachman and his wife both testified that they informed appellants that the horses in question were mortgaged to appellee, and that appellants could not take them, while several persons called as witnesses on behalf of appellants testified that Bachman, in answer to inquiries as to whether the horses in question were to be taken with the other property described in the bill of sale, said that they were, and that he turned them over to appellants to be so taken.

Patchin v. Crossland, 145 App. 589.

The first, second and third instructions given at the instance of appellee informed the jury in varying phraseology that if the two horses in question were not included in the chattel mortgage and bill of sale given by Bachman to the bank, and were taken by appellants from the possession of Bachman without his consent and against his will, that then the failure of appellee to file his mortgage for record prior to the taking of said horses by appellants would not affect the right of appellee to take said horses under his mortgage.

It is urged in criticism of these instructions that they ignore the right of appellants to take said horses under the mortgage and bill of sale to the bank, if it was the intention of Bachman and the bank that said horses should be described and included therein. What we have heretofore said as to the admissibility of parol evidence offered for the purpose of showing that other property not answering the description of the property embraced in the chattel mortgage and bill of sale, was intended to be included therein, is a sufficient answer to the objection urged against said instructions. The fact that the fifth and sixth instructions given on behalf of appellee made reference to the intention of Bachman and the bank that said horses should be included in the mortgage and bill of sale cannot avail appellants anything because said instructions stated the law more favorably for appellants in that respect than they were entitled to.

The reference in the second instruction to the undisputed fact that the chattel mortgage to appellee was given by Bachman to secure the payment of the purchase price of the horses in question did not in any way prejudice appellants. The instruction did not suggest that appellee acquired any superior right under his chattel mortgage by virtue of the fact that it was given to secure the payment of the purchase price of said horses.

The fact that the bill of sale from Bachman to the bank was a transaction intended to operate as a pay-

ment of the note to the bank secured by a chattel mortgage covering the same property was shown by the evidence offered on behalf of appellants, and a mere reference to such fact in the seventh instruction given at the instance of appellee cannot be complained of by appellants. The right which the bank asserted to the property was acquired by virtue of the bill of sale, and appellants were not authorized to take any property other than that described in the bill of sale or voluntarily turned over to them by Bachman as being embraced within its terms. The property described in the bill of sale having been given by Bachman and accepted by the bank, in full payment of the indebtedness to the bank, it follows that any property other than that covered by the bill of sale turned over by Bachman to appellant, was so turned over without any consideration. What we have here said answers the objections urged to the eighth and ninth instructions given at the instance of appellee.

It is conceded that the twelfth instruction given on behalf of appellee states a correct principle of law, but it is urged that because it is abstract in form and ignores the unexpressed intention of Bachman and the bank, as to what property should be described in the mortgage and bill of sale, it operated to mislead the jury. The unexpressed intention of said parties in the respect above indicated had no proper place in the case, and the instruction could not, therefore, have misled the jury.

The modification by the court of appellant's fifth instruction was in consonance with the views heretofore expressed by us and was proper. The modification by the court of appellants' eighth instruction is admitted by appellants to have made it conform to their theory of the case and they cannot, therefore, complain of such modification.

There is no error in the record prejudicial to appellants and the judgment of the Circuit Court will be affirmed.

Affirmed.

Ebbing v. Springfield Boiler & Mfg. Co., 145 App. 594.

Joseph H. Ebbing, Appellee, v. Springfield Boiler & Manufacturing Company, Appellant.

MASTER AND SERVANT—*when latter cannot recover.* A servant who having a discretion to adopt his own methods of doing work, wantonly, knowing and appreciating the relative dangers of both, elects to adopt the more dangerous method, does so at his peril and cannot recover for an injury resulting from his own conduct in that regard.

Action in case for personal injuries. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1907. Reversed, with finding of fact. Opinion filed November 17, 1908.

PATTON & PATTON, for appellant.

WILLIAM A. NORTHCOTT, ALONZO HOFF and WALTER A. ORR, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Joseph H. Ebbing brought his action on the case against the Springfield Boiler & Manufacturing Co., to recover damages for personal injuries alleged to have been sustained through the negligence of defendant and recovered a verdict and judgment in the Circuit Court of Sangamon county for \$6,590. The defendant appealed.

The case was submitted to the jury upon the amended first count and the fourth and fifth counts of the declaration. The amended first count charges that appellee was employed by appellant as a boiler maker and that it was the duty of appellant to exercise reasonable care to provide appellee with a reasonably safe place in which to work; that appellant failed in the performance of said duty and subjected appellee to extraordinary risk and hazard, in this, that a foreman and vice principal of appellant ordered appellee to remove

a certain wire cable from an iron girder, upon which said girder was an iron track, upon which track there was operated a certain iron crane; that appellee did not know the unsafe character of said place of work, which was known, or by the exercise of ordinary care could have been known to appellant; that while appellee was then and there so at work, by the direction aforesaid, and while exercising due care for his own safety, and not thereby assuming the risk, the said crane with great force and violence ran over and upon the leg of appellee, etc.

The fourth count alleges that appellee was directed by the foreman of appellant to go from his work of boiler making, to and upon said iron girder and track, and to remove said wire cable therefrom; that appellee was then and there unfamiliar with the state and condition of said girder and iron track over which said crane ran, and was unfamiliar with and had no knowledge of the manner in which said crane was used and operated by appellant and its servants, not fellow servants of appellee; that appellee was then and there carelessly and negligently directed by said foreman or superintendent to go to said place of work, which said place of work was extremely dangerous by reason of the operation of said crane upon and over said track upon the said iron girder, all of which the appellant well knew or could have known by the exercise of reasonable care in that behalf; that said iron crane was operated by a certain engine under the control of appellant, and it was then and there the duty of appellant, through or by its said foreman or superintendent, to have notified the engineer of said crane, that appellee was so at work upon said iron girder and track, and to have ordered said engineer to stop said crane from running over and upon said track upon said iron girder while appellee was so then and there at work; that in obedience to said order of the foreman appellee then and there climbed upon said iron girder and began to remove said cable, appellee not thereby assuming the risk thereof, and then and

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there exercising all due care and caution for his own safety in the performance of said work; that appellee while he was so at work then and there, and by reason of the negligence of the said foreman or superintendent in failing to notify said engineer to stop the running and operation of said crane, the said crane then and there, with great force and violence, ran against and over the leg of appellee, etc.

The fifth count alleges the same facts, and avers that it was then and there the duty of appellant's foreman to have stopped the running of said crane upon said track while appellee was engaged in removing said wire cable therefrom, and further avers a breach of said duty.

The facts disclosed by the evidence are substantially as follows: The main boiler shop of appellant is divided into three sections or aisles by two rows of steel columns running east and west, making a wide central aisle and two narrower aisles, one to the north of the north row of posts and one to the south of the south row. The north aisle is about forty feet in width and from 150 to 200 feet in length. Supported on the row of steel columns, about twenty feet from the ground is a steel girder about two feet in height, consisting at the top and bottom of V shaped pieces riveted together and connected by steel slats running transversely from the opposite sides. Upon the top of this girder, which is about a foot in width, is a steel rail, and on the north wall of the shop is a similar girder and rail. The crane here involved is a steel structure about forty feet in length, spanning from one girder to the other and at each end of the span are wheels whereby the crane is moved east and west upon the track, consisting of the girders and rails as described. The crane is operated by electricity by a crane man who sits in a chair on the north end of the span and on the east side of it, and is used for lifting and carrying heavy boiler material from one part of the shop to another within the aisle where it operates. In the center aisle

of the shop a crane similar in construction but much larger is operated upon girders and tracks fastened to the north and south row of columns, about twelve or fifteen feet above the girder supporting the crane in question.

On October 13, 1906, appellee was employed in packing machinery under the direction of Sprinkel as foreman, and continued at that work until October 15th, when he was directed by Sprinkel to take down a wire cable which was hung on blocks which were wedged beneath the top of the girder which supported the south rail of the crane track. For the purpose of doing this work appellee climbed upon the girder by means of a ladder fixed to one of the upright steel columns, which ladder was provided for the use of the employe operating the crane in reaching the same. Appellee then walked upon the girder toward the west end of the shop to the place where he was required to begin work, and there facing the east he put his right leg over the top of the girder and rail and standing with his left foot on the lower flange of the girder he stooped over and proceeded with his work. He had thus worked for about an hour, moving toward the east as he knocked out the several blocks which held the cable, when the crane was moved westward upon its track and the wheels ran over his right leg inflicting the injury complained of.

Appellee testified that when he was directed by Sprinkel to do the work he went in search of a ladder to use for that purpose; that the only ladder long enough to reach the girder was then in use; that he reported to Sprinkel that he could not get a ladder and inquired how he should get up to do the work, and what tools he would require; that Sprinkel told him to use the crane man's ladder and get up on the girder and do the work there; that the crane was then standing on the track near the crane man's ladder; that when Sprinkel told him to get up on the girder, he (Sprinkel) said to him: "As you go up look out for the crane,"

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or "You get up there, look out for the crane; it is standing right there by the ladder;" that Sprinkel then walked away to talk with the men on the floor of the shop who were engaged in handling the tongs used for the purpose of grappling the material which was to be moved by the crane; that the crane was then moved to the east end of the shop where Sprinkel followed it; that while he was at work on the girder, as before stated, he looked toward the crane several times and on each occasion it was stationary at the east end of the shop, a distance of about 140 feet from where he was working; that in doing the work required he necessarily had to keep his head down to see the wire cable; that there was considerable noise in the shop occasioned by the operation of pneumatic hammers, the riveting of boilers and the operation of the large crane in the center aisle of the shop, and there was some smoke rising from several coke stoves in which coal was then being burned; that by raising his head at any time while he was working he could have seen the crane if it was coming toward him; and that if he had seen the crane coming he could have climbed down on to the braces of the girder and gotten out of the way of the crane.

Sprinkel testified that appellee had to go up on the girder in some shape to properly do the work; that he directed appellee to go up there, but did not remember whether he told him to go on top of the girder or to go up on the girder; that the way in which appellee did the work was the quickest way to do it, and the way which almost every one would have selected; that when he directed appellee to do the work he told him "If you get on top in the road of the crane where it is liable to run over you, look out for it;" that he did not see appellee after he directed him to do the work until the accident happened, and that he did not instruct the crane man not to operate the crane over the portion of the track where appellee was at work. The evidence discloses that the crane man, Heinen, had no notice or knowledge that appellee was working upon the girder.

In the view we are constrained to take of this case it will only be necessary to consider and determine the question whether or not appellee was, under the evidence in the record, in the exercise of due care for his own safety at the time he was injured. The averments, in the several counts of the declaration that appellee did not know the unsafe character of the place of work, that he was unfamiliar with the state and condition of the girder, and that he had no knowledge of the manner in which the crane was used and operated, are wholly unsupported by any evidence in the record. On the contrary, it is conclusively established by the evidence that he was thoroughly familiar with the purposes for which the crane was used and with the manner of its operation upon the track, the south rail of which was supported by the girder in question.

At the time of his injury appellee was 23 years of age. Previous to his employment by appellant he had worked for two years and a half in a large boiler shop in Peoria, where a similiar crane was in use, and had frequently observed the manner in which it was used and operated. He was employed by appellant in October 1905, and worked in the shop while the machinery was being installed, and from May 1906, when the cranes were put in operation, until his injury in October following, appellee worked in the shop, saw the cranes in operation daily engaged in moving boilers which he had assisted in constructing.

It is not claimed on behalf of appellee that appellant's foreman, Sprinkel, gave him directions to assume the precise position upon the girder, which appellee found it most convenient to assume while doing the work, or that Sprinkel said anything which would justify appellee in assuming that the crane would not be permitted to run while he was doing the work, or that any warning would be given him when the crane was about to be operated. Assuming that Sprinkel directed appellee to go upon the girder to do the work, the warning given by Sprinkel to appellee in the lan-

guage testified to by the latter, viz., "As you go up look out for the crane," or "You get up there, look out for the crane, it is standing right there by the ladder," clearly shows that appellee had no reason to suppose that the crane would not be permitted to run while he was at work, or that any further warning would be given him, but rather that appellee must look out for the crane while he was at work. The contention on behalf of appellee that the warning only related to the care to be exercised by appellee, with reference to the crane, while he was climbing the ladder, and while the crane was standing upon the track in close proximity to the ladder, is manifestly unreasonable. The position of the crane at that time was as patent to appellee as it was to Sprinkel, and appellee must have known that no danger was to be apprehended from the crane while it thus remained stationary upon the track. That appellee understood that the warning applied to the danger to be apprehended from the movement of the crane, while he was at work, is obvious from the fact that he repeatedly looked at the crane, after it had moved to the east end of the shop, for the purpose of observing its location. The position he voluntarily assumed upon the girder required him to keep his head down while knocking out the wedges, but even in that position he was at liberty to raise his head at any time and by his own admission, he could, by so doing, have seen the crane approaching and avoided injury by removing his right leg and getting down upon the lower portion of the girder. Furthermore, the position which he voluntarily assumed was manifestly dangerous and unnecessary in the performance of the work required of him. He could have done the work safely by sitting upon the lower portion of the girder. It is elementary that an employe, who, having the discretion to adopt his own methods of doing work, wantonly, knowing and appreciating the relative dangers of both, elects to adopt the more dangerous method, does so at his peril, and cannot recover for an injury resulting from his

conduct in that regard. Illinois Steel Co. v. McNulty, 105 Ill. App. 594. Leighton & Howard Steel Co. v. Snell, 217 Ill. 152, relied upon by appellee is clearly distinguishable from the case at bar. In the Snell case the evidence disclosed that the injured servant was inexperienced and that his superior was present while he was attempting to execute the order.

The judgment of the Circuit Court will be reversed, with a finding of fact to be incorporated in the judgment.

Reversed with finding of fact.

FINDING OF FACT: We find as an ultimate fact that appellee was guilty of negligence which contributed to his injury.

Albert Rendahl, Appellee, v. Patrick Walsh, Appellant.

1. **VERDICT**—*when not set aside as against the evidence.* A verdict will not be set aside on review as against the evidence unless clearly and manifestly so.

2. **WITNESS**—*when wife not incompetent.* A wife who sues as next friend is not incompetent merely because her husband has given a bond for costs in the case.

3. **IMPUTABLE NEGLIGENCE**—*when does not bar recovery.* A minor having established a right to recovery will not be barred therefrom by reason of the negligence of its parents.

4. **APPEALS AND ERRORS**—*when abstract justifies affirmance.* An abstract which literally copies the evidence is not a compliance with the rule and justifies an affirmance.

Action in case for personal injuries. Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

BOYD & CLARK and F. M. & H. I. GREEN, for appellant.

RAY & DOBBINS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellee, Albert Rendahl, an infant of the age of four years, by Margaret Rendahl his next friend, to recover damages for a personal injury alleged to have been sustained through the negligence of appellant in permitting his mule to trespass upon the premises occupied by the father of appellee, as tenant of the appellant. The injury, which consisted of the breaking of appellee's leg, is alleged to have resulted from a kick by said mule. Upon a trial by jury there was a verdict and judgment against appellant for \$200.

The evidence tends to show that the barn yard in which appellee was playing at the time of his injury, and which his father had leased from appellant, was separated from appellant's field by a fence and gate; that shortly before appellee was injured appellant drove in a buggy from his field to said barn yard through the gate and permitted his horse and mules to follow into the barn yard; that shortly thereafter the mother of appellee was attracted by his screams and found him in the barn yard with his leg broken, and saw the mule of appellant standing near appellee; that subsequently the mother of appellee and the physician who was called to attend appellee, observed a semi-circular mark on his leg, which bore an exact resemblance to the imprint of the hind hoof of a mule. None of the witnesses called on behalf of appellee testified that they saw the mule kick appellee, and appellant testified that appellee was thrown down by a large dog with which he was playing. That appellant negligently permitted his horses and mules to enter the barn yard is established by his own evidence, and the case was tried in the court below by both parties upon the theory that if appellant was so negligent, and the injury resulted as alleged in the declaration, appellant was liable. Upon the question as to whether the injury was

inflicted by the mule as claimed by appellee or by a dog as claimed by appellant we are not prepared to say that the finding of the jury is against the manifest weight of the evidence. It is impossible to reconcile appellant's evidence as to the cause of the injury with the mark which appeared upon appellee's leg.

It is urged on behalf of appellant that Margaret Rendahl, who appeared as next friend for appellee, was an incompetent witness on his behalf because her husband had entered into a bond for costs and was, therefore, as it is claimed, directly interested in the result of the suit. This precise question has been determined against the contention of appellant in *Belk v. Cooper*, 34 Ill. App. 649, and *I. C. R. R. Co. v. Becker*, 119 Ill. App. 221. In the latter case the question is considered at length and we concur in the reasoning and conclusion there announced.

It is conceded by appellant that the contributory negligence, if any, of appellee would not bar a recovery, but it is urged that the sixth instruction given at the instance of appellee and which informed the jury that any want of due care or caution which might be shown upon the part of his parents would not be a defense to the suit if they believed from the evidence that appellee was otherwise entitled to recover, was erroneous. The negligence of appellant being established, contributory negligence, if any, of the parents of appellee was not imputable to appellee so as to bar a recovery by the latter. *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370; *C. & A. R. R. Co. v. Vipond*, 212 Ill. 199; *Union Trac. Co. v. Leach*, 215 Ill. 184. The instruction as framed is not a model, but taken together with all the other given instructions in the case the jury could not have understood therefrom that they were authorized to find a verdict in favor of appellee unless they believed from the evidence that appellant was negligent as alleged in the declaration. The judgment in this case might well have been affirmed for the failure of appellant to file such an abstract of the record as is

Goodheart v. Hall, 145 App. 604.

contemplated and required by the rule of this court. The greater part of the evidence in the case is literally copied in the so-called abstract, as it appears in the transcript by questions and answers, and an examination and consideration of the evidence as thus brought to our attention has involved an expenditure of much unnecessary time and labor.

There is no error in the record prejudicial to appellant and the judgment of the Circuit Court will be affirmed.

Affirmed.

Jesse M. Goodheart, Appellant, v. J. Whitney Hall, Appellee.

1. **CONTRACTS—how to be construed.** The construction of a contract is a question of law to be determined by the court.

2. **APPEALS AND ERRORS—function of propositions of law.** In order to save for review the question of the construction of a contract, it is necessary to present to the trial court propositions of law, where the cause has been tried by the court without the intervention of a jury.

Assumpsit. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1908. **Affirmed.** Opinion filed November 17, 1908.

BEN L. GOODHEART and FRANK Y. HAMILTON, for appellant.

M. A. BRENNAN and SIGMUND LIVINGSTON, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Plaintiff brought this suit to recover the sum of \$500 claimed to be due him from defendant, as a broker's commission for procuring one Fishbeck to enter into a written contract with defendant for the purchase of certain real estate. A trial of the case

by the court without a jury resulted in a finding in favor of the defendant and judgment against the plaintiff for costs.

There is no serious controversy as to the facts and the only question which the trial court was called upon to consider and determine was whether the written agreement entered into between defendant and Fishbeck became a valid, binding and enforceable contract for the purchase of the property by Fishbeck, or whether it merely constituted an option to purchase. The construction of the contract in this respect presented a question of law purely. *Chickering v. Bastress*, 130 Ill. 206; *Fleet v. Hertz*, 201 Ill. 594. If the agreement constituted merely an option contract plaintiff was not entitled to recover the commission sued for. *Lawrence v. Rhodes*, 188 Ill. 96. The only question involved being one of law, it was necessary in order to preserve such question for review in this court that plaintiff should have submitted to the trial court propositions to be held as the law of the case. As no such propositions were submitted to the trial court and no question is raised other than that relating to the proper construction of the written contract between defendant and Fishbeck, no question is properly presented for our consideration and determination upon this appeal. *Mutual Protective League v. McKee*, 223 Ill. 364; *Jacobson v. Liverpool & London & Globe Ins. Co.*, 231 Ill. 61; *Wight v. City of Chicago*, 234 Ill. 83. The motion by plaintiff for a new trial in the court below did not supply the omission to submit written propositions of law. *Jacobson v. Liverpool & London & Globe Ins. Co.*, *supra*.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Smith v. Miller, 145 App. 606.

Hulda Smith, Appellee, v. Samuel T. Miller, Appellant.

MEASURE OF DAMAGES—*in action for wrongful detention of property.* The rule as to the measure of damages in an action to recover for the wrongful taking and detention of personal property is that the plaintiff is entitled to recover as damages the value of the use of the property while it was detained and any depreciation in such value during its detention, produced by abuse or want of reasonable care on the part of the defendant.

Trespass. Appeal from the Circuit Court of Moultrie county; the Hon. W. G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

WALTER EDEN and EDEN & MARTIN, for appellant.

R. M. PEADRO and M. A. MATTOX, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee, Hulda Smith, recovered a verdict and judgment against the appellant, Samuel T. Miller, for the sum of \$307.41, in an action of trespass by appellee against said appellant and others, to recover damages for wrongfully taking and detaining certain personal property, consisting of a team of horses, harness, wagon, buggy and farm machinery, the property of appellee. The property was taken by the sheriff of Moultrie county under and by virtue of an execution issued out of the County Court of said county upon a judgment in favor of appellant against the husband of appellee. Thereafter there was a trial of the right of property, resulting in a verdict and judgment in favor of appellee, from which judgment an appeal was prosecuted to this court to the May term, 1907, and said judgment was there affirmed. *Miller v. Smith*, 137 Ill. App. 467. After the affirmance of said judgment by this court, the team of horses and harness were returned

to the appellee on December 13, 1907, and this suit was instituted by appellee, as before stated.

Appellee was deprived of the use of her property by its wrongful taking and detention for a period of 254 days, and the evidence tends to show that the reasonable value of the use of the team during that time was \$1 per day; that by reason of a want of reasonable care of said property by the appellant, and those acting for him, the property depreciated in value, during its detention, to the extent of from \$63 to \$113, as variously estimated by the witnesses.

The main contention advanced on behalf of appellant for a reversal of the judgment, a determination of which is practically decisive of the case, is, that the true measure of appellee's recovery is the interest upon the value of the property during its detention, and not the value of the use of the property during that time. This question is only involved in the case so far as it relates to the right of appellee to recover the value of the use of the team of horses.

The measure of damages in the case at bar is the same as in an action of replevin for the wrongful taking and detention of like property in *Odell v. Hole*, 25 Ill. 204, which involved the rule as to the measure of damages in an action to recover damages for the wrongful taking and detention of a mare, it was held that in an action of replevin, the plaintiff was entitled to recover as damages the value of the use of the property while it was detained, and any depreciation in the value of the property during its detention, produced by abuse or want of reasonable care on the part of the defendant. The same rule as to the true measure of damages in such cases is announced and applied in *Alley v. McCabe*, 147 Ill. 410.

The evidence in the record is ample to sustain the finding of the jury, based upon an application of the rule respecting the measure of damages as here announced, and as there is no error in the record which could have operated to the prejudice of appellant upon

Conner v. Conner, 145 App. 608.

the merits of the case, the judgment of the Circuit Court will be affirmed.

Affirmed.

Anna M. Conner, Appellant, v. Charles F. Conner, Appellee.

1. WITNESSES—*as to what wife competent; as to what not.* A wife is incompetent to testify as a witness to any admission or conversation of her husband relative to transactions concerning a benefit certificate in suit wherein she is named as beneficiary, but she is not incompetent to testify as a witness to such transactions relating to such benefit certificate, such as the delivery to her of said certificate, the keeping of the same by her, where she kept the same and the fact of the payment and advancement by her of money for the benefit and use of her husband.

2. ASSIGNMENTS—*of benefit certificate.* While a benefit certificate is not assignable at law, a beneficial interest therein may be transferred in equity, and courts of equity will protect such equitable beneficial interest.

Bill of interpleader. Appeal from the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

S. F. SCHECTER, for appellant.

O. M. JONES and ARTHUR R. HALL, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

The Modern Woodmen of America, a fraternal beneficiary society, filed its bill of interpleader to determine the conflicting claims of the appellant, Anna M. Conner, and appellee, Charles F. Conner, to the sum of \$2,000, being the amount of a benefit certificate issued to one James B. Conner. Upon the issues made by the several answers of appellant and appellee, and upon the payment into court by the said society of the

money in controversy the society was dismissed out of the case, and the cause was referred to the master in chancery to take and report the proofs together with his findings thereon. The master found that appellee was entitled to receive the amount payable under the certificate, and recommended that a decree be entered in accordance with such findings.

Appellant filed objections to the master's report, which objections were overruled, and thereafter filed exceptions to said report, which upon a hearing before the chancellor were also overruled and a decree entered in accordance with the report of the master.

The benefit certificate in question was issued July 12, 1904, to James B. Conner, and was made payable at his death to his wife, the appellant. Appellant and her husband lived together until July 5, 1905, when her husband was induced to go to the home of his brother, the appellee. At the time of his removal to the home of appellee James B. Conner was ill and appellant was temporarily absent from home. On July 7, 1905, James B. Conner made a written application to the beneficiary society for the cancellation of the certificate in which appellant was named as beneficiary, and for the issuance of a new certificate wherein appellee should be named as beneficiary. Upon receipt of such application and the surrender of the old certificate, the said society on July 13, 1905, issued a new certificate to James B. Conner payable at his death to appellee and delivered the same to said James B. Conner. James B. Conner died July 16, 1905.

Appellant asserts her right to the fund in question upon her claim that the original benefit certificate was delivered to her by her husband, with the statement by him that she should keep the same and upon his death should collect the proceeds and apply the same to the re-payment of money paid and advanced by her out of her individual funds for his use and benefit; that she kept the certificate in her drawer in the house until the same was taken therefrom without her knowl-

edge or consent by appellee and his mother; that she had paid nearly all of the assessments upon the certificate and had also paid all dues for her husband in a building association; that she had advanced for her husband various sums of money out of her individual funds aggregating \$700; and that she had made all such payments and advances upon the faith and credit of said certificate. The claim of appellee to the fund in question is based solely upon the fact that the original certificate was surrendered and cancelled and a new certificate issued wherein he was named as beneficiary.

It appears from the report of the master that he wholly disregarded the testimony of appellant as to any and all transactions between herself and her husband in his lifetime, and that he held such testimony to be inadmissible. Specific objections and exceptions were made by appellant to the exclusion by the master of her testimony in the case, and such objections and exceptions were overruled. Appellant was incompetent to testify as a witness to any admission or conversation of her husband relative to transactions concerning the benefit certificate, wherein she was named as beneficiary, but she was not incompetent to testify as a witness to transactions relating to said benefit certificate, such as the delivery to her by her husband of said certificate, the keeping of said certificate by her, and where she kept the same, and the fact of the payment and advancement by her of money to and for the benefit and use of her husband. Section 5 of Chapter 51, entitled "Evidence and Depositions," does not render the husband or wife incompetent to testify to transactions occurring during the marriage except where such husband or wife are called to testify as witnesses for or against each other. In the case at bar the husband is dead and appellant was not called as a witness to testify for or against her husband. The proviso, however, in the section referred to did

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not make appellant competent to testify to any admission or conversation of her husband.

The exclusion, in whole, of the testimony of appellant improperly deprived her of the only evidence at her command to establish the existence of certain transactions necessary to be established by her, in support of her claim. Exclusive of the evidence of appellee of admissions and conversations of her husband, which was properly excluded, the evidence of the witness George W. Conner, a brother of appellee, the witness Kelley, father of appellant, and the witness Lou Laird, as to admissions and conversations of the husband of appellant, tends to establish the existence of a contract between appellant her husband, whereby appellant acquired a beneficial interest in the benefit certificate which is enforceable in a court of equity.

While a benefit certificate is not assignable at law, a beneficial interest therein may be transferred in equity, and courts of equity will protect such equitable beneficial interest. *Royal Arcanum v. Tracy*, 169 Ill. 123; *McGrew v. McGrew*, 190 Ill. 604; *Ptacek v. Pisa*, 231 Ill. 522.

In the case of *Gordon v. Gordon*, 117 Ill. App. 91, relied upon by appellee, the party claiming a beneficial interest in the certificate, there involved, had not been named as beneficiary therein or in any other benefit certificate issued to the deceased in his lifetime, and that case is thus distinguishable from the case at bar.

The decree of the Circuit Court will be reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

Pierce v. Shay, 145 App. 612.

**Thomas L. Pierce, Appellant, v. James E. Shay et al.,
Appellees.**

CONTRACTS—effect of partial illegality of consideration. If any part of an entire consideration for a promise or any part of an entire promise be illegal, the whole contract is void.

Bill in equity. Appeal from the City Court of Mattoon; the Hon. T. N. COFER, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

F. N. HENLEY, CLARENCE W. HUGHES, and VOIGT & BENNETT, for appellant.

BRYAN H. TIVNEN, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

The appellant, Thomas L. Pierce, filed his bill in equity to the January term, 1907, of the City Court of Mattoon, against William T. Layton, John H. Tivnen, trustee, and Edmund D. Jones, to foreclose a mortgage bearing date August 25, 1905, executed by said Layton to secure three principal notes bearing even date with said mortgage, for the sum of \$100 each, payable to the order of said Layton in 1, 2 and 3 years, respectively, after date, with 5% interest, the said notes being endorsed by the said Layton in blank. Appellee, James E. Shay, was permitted to intervene in the suit and thereupon filed his answer to the bill denying appellant's title to the notes and mortgage, and charging that the maker William T. Layton endorsed said notes to the said Shay and that the appellant won said notes from the said Shay in a game of chance at cards; and that appellant never paid any valuable consideration for the said notes and mortgage. Shay also then filed his cross bill wherein he set up the same matter alleged in his answer, and further alleged that he was the owner of said notes and mortgage; that Layton had made default in the payment thereof and prayed

that the said notes and mortgage be decreed to be his property, and for a foreclosure of said mortgage. Layton filed his answers to the original and cross-bills, wherein he denied default and tendered the amount due upon the matured note, together with interest upon the three notes. Appellant answered the cross-bill denying that Shay was the owner of said notes and mortgage, and that he (appellant) had gained possession of the same as alleged in the cross-bill, and denied that he had not paid a valuable consideration for the same. The cause was heard by the chancellor in open court and a decree entered finding that the notes and mortgage were executed by Layton as alleged in the original and cross-bills; that appellant was not the lawful owner of said notes and mortgage but had obtained the same from Shay in consideration of the surrender by him to Shay of a note for \$100 executed by Shay, and the further consideration of the delivery to Shay by appellant of his personal check for \$192; that appellant, together with Shay and one Musgrove, had, before the delivery of the said notes and mortgage to appellant, gambled together for money and that in settlement of one of such gaming transactions Shay had given to appellant a note for \$100, being the same note which appellant had surrendered to Shay; that the check for \$192 given by appellant to Shay was knowingly so given at the time and place of a gambling transaction between Shay and Musgrove for the purpose of enabling Shay to bet in a game of chance with Musgrove; that Musgrove won the said check from Shay in said game of chance and secured the money thereon at the bank, and that appellant and Musgrove were confederates in said gambling transaction.

The decree directed that the bill of appellant be dismissed for want of equity; that appellant pay the costs of said proceeding to the filing of the decree and that the mortgage be foreclosed under the prayer of the cross-bill.

It is urged on behalf of appellant that the decree is contrary to the law and is not supported by the evidence in the record. Appellant is in error in assuming that the decree is predicated upon the theory that Shay was entitled to recover the amount of the check for \$192 given to him by appellant, as for money lost by Shay to appellant in a game of chance. As we view the case the decree is primarily predicated upon the finding of the court that appellant and Musgrove collusively connived and confederated to induce Shay to transfer the said notes and mortgage to appellant, and that the transfer thereof so procured from Shay was without consideration.

The evidence tends to show that prior to the transaction here involved the appellant, Musgrove and Shay had played poker together and that Shay was generally the loser; that upon the day when the transfer of the notes and mortgage was made to appellant Musgrove and Shay had been engaged in playing poker and that the latter had lost as usual; that Shay desired to continue playing in the hope of retrieving his losses and to that end suggested to Musgrove that if he (Musgrove) could find some one to purchase the notes and mortgage he (Shay) would continue to play; that Musgrove suggested appellant as a probable purchaser of the notes and mortgage and interviewed appellant for that purpose; that through the efforts of Musgrove the appellant and Shay had an interview which resulted in the transfer of the papers by Shay to appellant; that appellant then knew, or had reason to believe, that Musgrove and Shay had been engaged in playing a game of poker in which Shay was the loser, and that the purpose of Shay in negotiating the notes and mortgage was to procure means to continue the game; that the transaction was closed about midnight; that in consideration for the transfer to him of said notes and mortgage appellant surrendered to Shay the latter's note for \$100 which Shay had given to appellant in settlement of a gambling debt, and also

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his check for \$192 payable to his own order and indorsed in blank.

Appellant testified that no computation was made of the amount due upon the notes; that the notes were not worth their face value and that the surrender to Shay of the \$100 note did not form any part of the consideration for the transfer, because said note was considered worthless. In addition to the testimony of Shay we think the fact that the amount of the check given by appellant to Shay together with the note for \$100 surrendered to Shay, approximates the amount due upon the notes in question, authorizes a finding by the chancellor that said \$100 note formed a part of the consideration for the transfer. So far as the transfer was made in consideration of the surrender of said \$100 note it was void.

It is well established that if any part of an entire consideration for a promise or any part of an entire promise be illegal the whole contract is void. *Douthart v. Congdon*, 197 Ill. 349; *First National Bank v. Miller*, 235 Ill. 135.

A careful examination of the evidence in the record confirms the propriety of the decree in this case, and the same will be affirmed. One-half of the cost of the additional abstract filed by appellee will be taxed against the appellant.

Affirmed.

**Joseph Comerford et al., Appellees, v. W. W. Morrison,
Appellant.**

1. DRAINAGE—*section 4 of Farm Drainage Act construed.* This section does not justify the diversion of the natural flow of surface water and the construction of a tile drain is not authorized thereby which does not drain the land sought to be drained in the general course of the natural drainage of the land.

2. INSTRUCTIONS—*when containing abstract proposition of law will not reverse.* An instruction which contains a correct abstract proposition of law will not reverse unless misleading.

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3. INSTRUCTIONS—*when error cannot be predicated upon.* A party cannot be heard to complain of an instruction where he has procured one of like character to be given on his own behalf.

4. MEASURE OF DAMAGES—*in action for wrongful diversion of surface water.* In such case the true measure of damages is the rental value of the land in question together with the cost of seed and labor expended in and about the crop claimed to have been lost by reason of such diversion.

5. MEASURE OF DAMAGES—*when inaccurate instruction will not reverse.* If the damages awarded are not excessive and fairly represent the damages shown by the evidence, an inaccurate instruction upon the measure of damages will not reverse.

Action on the case. Appeal from the Circuit Court of Christian county; the Hon. A. M. ROSE, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

JAMES M. TAYLOR, LESLIE J. TAYLOR and HOGAN & WALLACE, for appellant.

FRANK P. DRENNAN and J. C. & W. B. McBRIDE, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellees against appellant to recover damages alleged to have been occasioned by the act of appellant in wrongfully diverting the flow of surface water from his land to and upon the land of appellees, whereby the land of appellees was rendered unfit for tillage and the crops growing thereon were injured. A trial by jury in the Circuit Court of Christian county resulted in a verdict and judgment against appellant for \$500.

Appellees are the owners of the east half of the southeast quarter of section 36 in Locust township, and appellant is the owner of the northwest quarter of section 6, in Pana township. The south boundary line of appellees' land extended east from the southeast corner of said land forms the north boundary line of appellant's land and the west boundary line of appel-

·lant's land extended north from the northwest corner of said land forms the east boundary line of appellee's land. Upon these boundary lines are two public highways, one running east and west and the other north and south, which highways at their intersection separate the northwest corner of appellant's land from the southeast corner of appellees' land. Running diagonally in a northwesterly direction through the west half of appellant's land is the right of way and track of the Baltimore and Ohio Railroad, southwest of which lies about thirty-five acres of appellant's land. There is also a public highway adjoining the railroad right of way on the south, which public highway intersects the north and south public highway before mentioned, at the west line of appellant's tract of land.

In the spring of 1901 appellant constructed a tile drain beginning a short distance north of the south line of his tract at a point on the south side of the public highway which runs parallel with the railroad right of way, thence running northwesterly on the south side of said highway to a point near the west line of his land, thence north, crossing said highway and railroad right of way, to the northwest corner of his land where it was discharged into an open ditch on the east side of the north and south highways. Into this main tile drain as so constructed of seven and eight inch tile appellant ran small lateral tiles through the portion of his land lying south and west of the railroad right of way. The open ditch on the east side of the highway was of insufficient capacity to carry the water discharged into it by the tile drain and in consequence thereof the water overflowed said ditch and ran west across said highway to and upon appellees' land, thereby causing the injury complained of.

It is urged that the jury were actuated by passion and prejudice, and that the verdict is against the manifest weight of the evidence. A careful examination of the voluminous record in this case fails to disclose

anything which could have operated to arouse the passion or prejudice of the jury against appellant. The case appears to have been tried in the same manner as cases of like character are generally tried. It is shown by a clear preponderance of the evidence that the general course of the natural drainage of surface water upon that portion of the land of appellant which lies northeast of the railroad right of way, and of the land immediately north thereof, owned by one Smith, is toward the northwest over and across the land belonging to appellees, and we do not understand that appellees are seeking to recover any damages for injury resulting to their land by reason of the flow of surface water on their land from that portion of appellant's land which lies northeast of the railroad. The declaration merely charges the wrongful diversion by appellant of the surface water from that portion of his land which lies southwest of the railroad. Whether the general course of natural drainage of surface water upon the land of appellant which lies southwest of the railroad is toward the north over and across the land of appellees or toward the west, over and across the land belonging to one Higgins, is the crucial question of fact in the case, the solution of which question involved the examination of numerous expert and other witnesses called on behalf of the respective parties. The evidence clearly tends to show that there is a perceptible rise in appellant's land at a point where the railroad right of way crosses the west line of his land. This situation is manifest from the fact that the tile drain constructed by appellant was laid at a much greater depth at the point indicated than at any other point in the line of said drain.

Beginning at a point a short distance north of the center of the Higgins tract of land, described as the northeast quarter of section 1, in Rosemond township, and which is immediately west of appellant's land, there is a well-defined watercourse in which sur-

face water flows in a northwesterly direction, and the character of the depression which forms said watercourse clearly indicates that it has served as a natural outlet for surface water from a considerable territory lying southwest of the railroad right of way. Without unduly extending this opinion by a detailed consideration and discussion of the testimony of the several witnesses called by the respective parties, as the same appears in the record, we are persuaded that the jury were not unwarranted in finding that the natural course of drainage of surface water from the land of appellant which lies southwest of the railroad right of way is toward the west across the Higgins tract of land, and not toward the north across the land of appellees.

It is uncontroverted that prior to the construction by appellant of the tile drain in question appellees' land was not injuriously affected by the flow thereon of surface water to the extent it was so affected after the construction of such a tile drain.

In justification of his right to construct the tile drain in question, appellant cites section 4 of the Farm Drainage Act, which is as follows: "Owners of land may drain the same in the general course of natural drainage by constructing open or covered drains discharging the same into any natural watercourse or into any natural depression whereby the water will be carried into some natural watercourse or into some drain on the public highway, with the consent of the commissioners thereto; and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation." Hurd's Stat. 1905, 800. This section of the statute is ineffectual to aid appellant because the tile drain constructed by him did not drain the portion of the land sought to be drained thereby in the general course of natural drainage of said land. Owners of land are not thereby authorized to drain the same otherwise than in the general course of natural drainage, and the right

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of such owners, with the consent of the commissioners, to discharge their drains into some drain in the public highway, is limited to cases in which such drainage is attempted to be affected in the general course of natural drainage of the land. It is not claimed on behalf of appellant that the drain constructed by him discharged the water into any natural watercourse, or into any natural depression whereby the same would be carried into some natural watercourse, but it is insisted that appellant obtained the consent of the commissioners to discharge his drain into a drain upon the highway. This claim, even if it was supported by the evidence, could not avail appellant anything in the absence of a showing that he thereby drained his land in the general course of natural drainage, but we think the evidence fails to support the claim so made by appellant. While it appears from the evidence that the commissioners consented to the construction by appellant of a tile drain along the highway south of the railroad right of way, and that for the purpose of benefiting said highway said commissioners contributed a portion of the cost of the tile there used by appellant in constructing a drain, it does not appear that it was contemplated by said commissioners that appellant would construct his drain across the railroad right of way and discharge it into the ditch on the east side of the north and south highway.

Appellees' first instruction, while abstract in form, is an accurate statement of the law applicable to the case and contains nothing which could have operated to the prejudice of appellant. There was no pretense that the drain constructed by appellant collected the surface water from his entire quarter section and discharged such surface water into the ditch in the highway. The declaration merely charges appellant with wrongfully diverting the surface water from that portion of his land, which lies southwest of the railroad right of way, and the reference in appellees' second, fourth, fifth and sixth instructions to the collec-

tion and diversion by appellant of surface water upon his land could only have been understood by the jury as relating to the collection and diversion of surface water from the land of appellant lying southwest of the railroad right of way.

It is urged that appellees' third and fifth instructions improperly informed the jury that appellant would be liable, notwithstanding he obtained the consent of the commissioners to discharge his drain into a drain in the public highway, if such drain in the public highway was insufficient to carry the water into some natural watercourse. It is a sufficient answer to this objection to say that by the first instruction given at his instance appellant assumed the burden of proving that the ditch in the highway into which he discharged his tile drain was of sufficient capacity to carry all the water coming into it. A party cannot be heard to complain of an instruction where he has procured one of like character to be given on his own behalf. *Chicago City Ry. Co. v. Pural*, 224 Ill. 324; *Purtle v. Bell*, 225 Ill. 523; *Chicago City Ry. Co. v. Hagenback*, 228 Ill. 290.

The several instructions offered by appellant and refused by the court were sufficiently covered by the given instructions in the case, and appellant was not in any manner prejudiced by the refusal of the court to give such instructions.

It is urged that the seventh instruction given at the instance of appellees states an incorrect rule as to the measure of damages for the injury, if any, sustained by appellees, and that it improperly assumes that appellees' land suffered damages by the alleged wrongful act of appellant. By that instruction the jury were only authorized to consider the question of damages if they should find for appellees.

The only issue to be determined by the jury preliminary to the assessment of damages was whether or not appellant had wrongfully diverted the flow of surface water upon the land of appellees as alleged in the decla-

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ration, and a finding by the jury in favor of appellees upon that issue necessarily, under the evidence, determined the liability of appellant for some damages. The instruction as given, therefore, cannot be said to have improperly assumed that appellees had suffered damage by the alleged wrongful act of appellant. The measure of damages in the case is stated in the instruction, to be the difference in the market value of the crops raised upon the premises and the market value of the crops which would ordinarily have been raised upon the premises had they not been damaged as alleged in the declaration less the cost of harvesting and delivering such crops to the market. As applied to the facts in this case the measure of damages stated in the instruction is inaccurate, but in addition to showing the rental value of their submerged lands appellees offered evidence to establish the amount of their damages based upon the rule as stated in the instruction and appellant offered no objection thereto upon the ground that such evidence was improper to be considered by the jury in determining the amount of appellees' damages. Appellees claimed damages to thirty-five acres of their land and to their crops grown and attempted to be grown thereon for the years 1901, 1902, 1903 and 1904. Estimating appellees' damages upon the basis of the rental value of the land at from \$3.50 to \$4.00 per acre, as shown by the evidence, together with the cost of seed and value of labor expended, which we think is the true measure of damages applicable to the facts in this case, the amount of damages awarded to appellees by the jury approximates the amount actually recoverable by appellees and is not excessive.

In this state of the record the giving of an instruction announcing an incorrect rule as to the measure of damages should not operate to reverse the judgment and the error in that regard was harmless. *Mantonya v. Emerich Outfitting Co.*, 172 Ill. 92; *Berry v. Campbell*, 118 Ill. App. 646; *Luick v. Scheffel*, 32 Ill.

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App. 17; City of Pana v. Broadman, 117 Ill. App. 139.

When crops planted are destroyed before coming up the measure of damages is the rental value of the land, the cost of the seed and the value of the labor expended. Young v. West, 130 Ill. App. 216. In B. & O. S. W. R. R. Co. v. Stewart, 128 Ill. App. 270, the rule governing the measure of damages in such cases is stated thus: "When the crop is not up, the damage should be estimated upon the basis of the rental value and the cost of the seed and labor in preparing the ground and planting the crop; where the crop is up but not so far matured that the product can be fairly determined, the injured party can recover, in addition to the above, the cost of any labor bestowed after the planting; where the crop is more or less matured so that the produce can be fairly determined, the value of the crop at the time of the loss is the measure of damages, and it is only where the crop is fully matured and ready to be harvested that damages can be determined by the market value of the crop less the cost of harvesting and marketing, which must include all care and preparation for marketing, such as packing, crating, baling, threshing and the like, according to the nature of the crop." In Economy L. & P. Co. v. Cutting, 49 Ill. App. 422, it was held, that the measure of damages for the destruction of a growing crop is the value of the crop as it was when destroyed, with the right to the owner to mature or harvest and gather it at the proper time, and that the value of the crop is a matter of estimate or conclusion of the mind to be arrived at from all the facts that would affect it. The rule as stated in the case last cited is approved and followed in St. L., M. B. T. Ry. Ass'n v. Schultz, 226 Ill. 409.

There is no reversible error in the record and the judgment of the Circuit Court will be affirmed.

Affirmed.

Watson v. Mickleberry, 145 App. 624.

J. C. Watson, Appellant, v. E. R. Mickleberry, Appellee.

1. *CONTRACTS—when default in performance providing for sale of real estate does not appear.* A default in the performance of a contract providing for the sale and conveyance of real estate which will justify an action at law is not established where it appears that the contract contains mutual obligations and the plaintiff does not show that those obligations which it was incumbent upon him to perform have been carried out.

2. *CONTRACTS—right to reasonable time to correct defects of title.* A party to a contract for the sale and conveyance of land is entitled to a reasonable time after being notified of defects in his title to cure such defects, and until such time has elapsed with a failure to cure such defects no default can be successfully urged.

Action in debt. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

CALVIN RAYBURN, for appellant.

CHARLES I. WILL and BARRY & MORRISSEY, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellant brought his action in debt against appellee to recover \$2,500 as a stipulated penalty, for the alleged breach of a contract for the exchange of real estate. Upon the trial of the cause by the court without a jury, the court upon motion of appellee, made at the close of appellant's evidence, found the issues in favor of appellee, and rendered judgment against appellant for costs.

By the terms of a written contract bearing date October 16, 1906, appellee agreed to convey to appellant by warranty deed, on or before November 1, 1906, and upon the payment by the latter of \$600, 245 acres of

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land, free and clear of all liens, except a mortgage for \$12,000 with interest from February 24, 1906, and to pay the taxes on said land for the year 1906, appellee to receive one-half of the crop then growing thereon, and appellant agreed to convey to appellee by warranty deed on or before said date, certain property in the city of Bloomington, free and clear of all encumbrances except a mortgage for \$6,000 and interest from July 1, 1906, and to furnish a certain bond as indemnity against a certain judgment for \$2,000, which judgment was a lien against the property.

It was further thereby agreed that each party should furnish to the other an abstract brought down to date showing merchantable title in the grantor to the premises involved; that time should be of the essence of the agreement; that upon the failure or refusal of either party to comply with the provisions of the agreement, the party so failing or refusing should forfeit and pay to the other the sum of \$2,500 as liquidated damages; and that in case the abstract of title furnished by either party should be found upon examination to be defective, such party should have a reasonable time to have said abstract corrected.

The only witness in the case was Charles M. Buck, called on behalf of appellant, who testified that about a week prior to November 1, 1906, appellant placed the papers in the case in his hands and authorized him to perform the agreement; that on the morning of November 1, 1906, appellee called him over the telephone and inquired if appellant was in town; that he told appellee that appellant was not and would not be in town, and that appellant then said: "This is the day the deal is to be closed;" that he replied to appellee that appellant had placed the papers in his hands and they were ready to perform; that appellee said he would get his attorney and would be over in fifteen minutes; that shortly thereafter, while the witness was engaged in figuring on the account between the parties, appellee with his attorney, Hamilton, came

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into his office; that appellee told the witness that Hamilton had the abstract and that it had better be passed upon first; that the witness told appellee to take the abstract to his partner Mr. Rayburn and have him pass on it, and that he would then accept it; that appellee and Hamilton went into Mr. Rayburn's room, where they remained about fifteen minutes, while the witness continued figuring on the account; that upon the return of appellee, the witness said: "I will soon be through with this" (referring to his figuring on the account), and that appellee then said "There is a mortgage appearing on my abstract—I will have to get a release for, it will take me four or five days;" that the witness said "I am ready to close it up now," and that appellee replied "It will take four or five days," and went out of the office. The witness further testified that appellee came to his office five or six days later with his abstract of title and said he had obtained a release of the mortgage; that witness replied he didn't think it would do any good to examine the abstract or have it examined then, because he was only authorized to perform the contract as it was and not to make a new contract.

Upon his cross-examination the witness testified that four or five days after he received the abstract of title to the lands owned by appellant he went to appellee and inquired what appellee would take to let appellant out of the contract; that a certain assessment which was then a lien against appellant's property had not been paid on November 1, 1906; and that appellee had never refused to perform the contract on his part.

A careful examination of the evidence of this witness as it appears in the record persuades us that both parties to the contract desired to avoid performance, and that each was seeking to gain a technical advantage of the other for the purpose of declaring a forfeiture of the same and enforcing the penalty.

It does not appear that appellee refused to perform the contract on November 1, 1906, when it is insisted

a forfeiture was incurred, and we do not think that appellant then made a *bona fide* tender or offer to perform on his part. Neither the deed to the premises owned by appellant, nor the bond provided in the contract to be given by appellant to appellee as indemnity against a certain judgment for \$2,000, which was then a lien upon said premises, was exhibited or tendered to appellee, and the fact that an assessment against the property of appellant, which was a lien thereon, was then unpaid shows that appellant was not then able to perform the contract on his part. It is uncontroverted that there was a defect in the abstract of title to appellee's property, in that it failed to show a release of a certain mortgage, and it is fairly inferable from the evidence that such defect in the abstract was noted by the attorney for the appellant, and that appellee was required to have the same corrected. By the express terms of the contract either party, in the event that his abstract was found to be defective, was entitled to a reasonable time to have the same corrected. This provision of the contract is to be given effect, in connection with the provision fixing November 1, 1906, as the time of its performance, in construing the entire contract, and we are of opinion that appellee was entitled to a reasonable time after the discovery by appellant of the defect in the abstract, to have the same corrected, and that a default in the terms of the contract could not be imputed to appellee until the expiration of such reasonable time.

Where the undertakings of the parties to a contract are mutual and dependent, it is incumbent upon the plaintiff to comply with that which he has undertaken to do (unless non-compliance is excused or justified), before he can be permitted to maintain an action to recover damages for a failure on the part of the defendant to comply with the obligations of the contract on his part. *Tichenor v. Newman*, 186 Ill. 264.

Applying this principle of law to the facts in the case at bar, we concur in the finding of the trial court, and the judgment will be affirmed. *Affirmed.*

**Joseph Henry et al., Appellees, v. Samuel M. Miller,
Appellant.**

1. **MECHANIC'S LIENS**—*when owner liable for repairs made by lessee.* A lien will be enforced against the owner of land for repairs made by his lessee where the lease provided that the lessee shall make such improvements and that the same shall become the property of the lessor at the expiration of the lease.

2. **MECHANIC'S LIENS**—*what not subject of.* Labor performed in mining coal in the regular course of operating a mine is not performed in the making of any improvement within the meaning of the statute providing for mechanic's liens and therefore cannot be made the basis of mechanic's lien relief.

3. **MECHANIC'S LIENS**—*allowance of solicitor's fees improper.* The mechanic's lien statute which provides for the allowance of solicitor's fees to the plaintiff's solicitor, is unconstitutional and such an allowance is improper.

Bill in equity. Appeal from the Circuit Court of Montgomery county; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the May term, 1908. Affirmed in part and reversed in part and remanded. Opinion filed November 17, 1908.

JETT & KINDER, for appellant.

LANE & COOPER, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

On June 30, 1906, the appellant, Samuel M. Miller, leased to Louis J. Robertson certain lands and premises, including buildings, improvements and machinery, to be operated as a coal mine, for a term ending April 1, 1912. The lease provided that Robertson should put in a good boiler and electric bells within ninety days from the date thereof at his own expense, and also make any other improvements he might desire, such improvements to become the property of Miller at the expiration of the lease. The lease further provided that Robertson should have the privilege of

purchasing the leased premises at any time during the life of the lease for the sum of \$20,000 in cash. Robertson went into possession of the premises under the lease and thereafter employed laborers and mechanics to do necessary work in and about the construction and repair of the tippie and top works at the coal mine. Robertson also employed miners to dig coal. On November 29 or 30, 1906, the lessor, Miller, declared a forfeiture of the lease for non-payment of rent and took possession of the premises. Thereafter appellees filed their bill in equity against Miller and Robertson to establish and enforce a mechanic's lien upon the premises for work performed and material furnished by them in repairing and constructing said tippie and top works at the mine, and for labor performed in mining coal therein. On the hearing before the chancellor upon the evidence taken and reported by the master in chancery, a decree was entered finding that the several petitioners were entitled to a mechanic's lien upon the premises involved for the several amounts due said petitioners, aggregating the sum of \$304.53, together with the sum of \$60 as their reasonable solicitor's fees to be taxed as costs. To reverse this decree Samuel M. Miller appeals to this court.

Appellees predicate their right to the enforcement of a lien in said case upon the provisions of section 1 of the Mechanic's Lien Act of this state. Hurd's Stat. 1905, 1317. The evidence tends to show that the top works and tippie at the mine in question, at the time Robertson took possession under his lease from appellant, were dilapidated and out of repair, and that it was necessary to construct and repair the same to properly operate the mine. The evidence further tends to show that appellant was present while the work of construction and repair was being performed and that he made no objection thereto. The conduct of appellant in this regard taken in connection with the provisions of the lease, which authorized the mak-

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ing of improvements by the lessee, which improvements were to become the property of the lessor at the expiration of the term, entitles appellees to a lien therefor within the terms of the statute, which provides that, the person furnishing material or performing labor under contract with the owner, "or with one whom such owner has authorized or knowingly permitted to contract for the improvements," shall have a lien, etc.

In so far as the several amounts awarded to appellees include pay for their labor in mining coal the decree cannot be sustained. The labor performed in mining coal in the regular course of operating the mine was not performed in the making of any improvement within the meaning of the statute providing for a lien. The allowance of solicitor's fees to be taxed as costs was also erroneous. *Manowsky v. Stephan*, 233 Ill. 409.

The decree of the Circuit Court awarding a lien to appellees for labor performed and material furnished in constructing and repairing the top works and tipple at the mine will be affirmed, and such decree will be reversed wherein it awards to appellees a lien for labor performed in mining coal, and wherein it provides for the payment of solicitor's fees by appellant. One half of the costs herein will be taxed against appellant and one-half against the appellees.

Decree affirmed in part and reversed in part and the cause remanded for further proceedings not inconsistent with the views here expressed.

Affirmed in part, reversed in part and remanded.

Grant Whitsett, Appellant, v. Wellington Starch Company, Appellee.

MASTER AND SERVANT—*when doctrine of assumed risk applies.* A servant of mature years is barred from a recovery for injuries sustained while in the service of his master if such injuries were the result of a risk open and obvious and understood by him, and of the existence of which he had made no complaint.

Action in case for personal injuries. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 17, 1908.

BUCKINGHAM & GRAY, for appellant.

LE FORGEE & VAIL and BEACH, HODNETT & TRAPP, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is an action on the case by appellant against appellee to recover damages for a personal injury resulting from the alleged negligence of appellee. At the close of the plaintiff's evidence the trial court, upon the motion of defendant, instructed the jury to find the defendant not guilty, and upon the verdict so returned judgment was entered against plaintiff for costs.

The declaration contains two counts. The first count alleges that on April 9, 1907, appellee was operating a starch-mill wherein there was an elevator used in carrying unfinished starch from the first floor to the floors above; that the starch was placed in receptacles which were packed in a crate which was three feet wide, five feet long and seven feet six inches high, equipped with two wheels upon an axle near the center and bottom and smaller wheels at each end, which crate when loaded weighed about 3,000 pounds; that when the crate was so loaded it was wheeled from the

first floor of the mill onto the platform of the elevator, whereby it was carried to the floor above; that the elevator platform was five feet ten inches in width and six feet ten inches in length; that in ascending and descending the elevator passed through openings in the floors and that the space between the sides of such openings and the platform of the elevator was about $\frac{3}{4}$ of an inch; that it was the duty of appellee to use due care to provide and maintain suitable appliances and guards upon the elevator and about the openings in the floors, to prevent persons from slipping off the elevator and being caught between it and the sides of the openings in the floor; that appellee not regarding its said duty negligently permitted the said elevator to be used and operated by appellant and its other employes, and negligently omitted to provide and maintain such appliances or guard; that on the day aforesaid appellant was in the employ of appellee, and the latter by its agents and servants negligently ordered and directed appellant to go upon the platform of said elevator with a crate, and to ascend with the said elevator and crate to the upper floor; that in pursuance to such order appellant got upon the elevator and started to ascend to such upper floor; that while such elevator was so ascending and while appellant was exercising due care for his own safety, by reason of the failure of appellee to provide and maintain proper appliances and guards his right foot slipped and was caught between the platform of the elevator and the side of the opening in the floor, and was thereby so crushed and mangled as to necessitate amputation between the ankle and knee.

The second count charges the same duty and breach and further alleges that the platform of the elevator was covered with starch and water thereby making the said platform slippery, and that appellee negligently permitted such starch and water to be upon the platform of said elevator.

It appears from the undisputed evidence that on

Friday, April 5, 1907, appellant applied to the superintendent of appellee for work, and that such superintendent then introduced appellant to the foreman with directions to the latter to put appellant to work; that said foreman took appellant to the first floor of the mill and said to the latter "Come in here and you can go to work, the boys will show you what to do;" that thereupon appellant with three other employes of appellee proceeded with their work which consisted in filling certain receptacles with starch, loading such receptacles into a crate, wheeling the crate on the platform of the elevator, and riding on the elevator to the upper floor of the mill. The platform of the elevator was constructed of wood, was perfectly level, and when the elevator was in position on the first floor the surface of the platform was flush with the surface of the floor, with a space between the edge of the floor and the edge of the platform of about $\frac{3}{4}$ of an inch. Neither the platform of the elevator nor the floor of the building was equipped with gates or guards.

After the crate as described in the declaration was filled, it was wheeled directly from the floor of the building onto the platform of the elevator and four employes of appellee, including appellant, rode on the elevator to the upper floor for the purpose of steady-ing the crate while it was being lifted and unloading it when the upper floor was reached. Appellant was thus employed continuously for four days and had made twenty or thirty trips per day on the elevator up to the time he was injured. When the crate was in position on the platform of the elevator there was an unoccupied space of about fifteen inches on each side of the platform and about eleven inches at each end. Some starch sifted through the crate upon the elevator platform, and the evidence tends to show that employes of appellee occasionally washed screens or shakers near the elevator with a hose, and that some of the water so used sprayed upon the elevator platform.

On the occasion of his injury, while appellant was standing erect riding upon the elevator and when the elevator had ascended to a point about eight inches below the opening in the second floor of the mill, his right foot slipped off the edge of the platform and before he could regain his footing or the elevator could be stopped his foot was crushed between the edge of the elevator platform and the second floor of the mill.

Appellant testified that he had not been cautioned or warned with reference to any danger attending the use of the elevator, and that upon one occasion he remarked to one of his companions that it looked to him as if the elevator might not be perfectly safe. Whether this remark of appellant related to the slippery condition of the elevator platform or to the strength of the cable by which the elevator was operated, is not entirely clear from the evidence. It does not, however, appear from the evidence that there was any wet starch upon the portion of the platform where appellant was standing when he was injured.

The action of the trial court in giving to the jury a peremptory instruction to find appellee not guilty raises the decisive question in the case, viz., whether or not as a matter of law upon the evidence disclosed by the record appellant assumed the risk whereby he was injured. It is insisted on behalf of appellant that the rule that the servant assumes all ordinary risks incident to the business presumes that the master has performed the duties of caution, care and vigilance which the law requires of him; that it is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution that the servant assumes. This is not a correct statement of the rule governing the doctrine of assumed risk. In *Cichowicz v. International Packing Co.*, 206 Ill. 346, it is said: "To say that the servant assumes no risk except such as cannot be obviated by the adoption of reasonable measures of precaution by the master is to abolish the

doctrine altogether. Under such a rule the master is liable in every case where he has been negligent, although the servant knows of the danger and voluntarily encounters it without objection, and if the master has been guilty of no negligence he has a complete defense, regardless of any question of the assumption of risk by the servant." In *McCormick Machine Co. v. Zakzewski*, 220 Ill. 522, it is said: "The true rule in this regard is, that the servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent, and if he voluntarily enters into or continues in the service, knowing or having the means of knowing its dangers, he is deemed to have assumed the risks and to have waived all claims against the master for damages in case of personal injury resulting from such dangers."

In *I. C. R. R. Co. v. Fitzpatrick*, 227 Ill. 478, the judgment was reversed for error in giving an instruction which informed the jury that the servant did not assume dangers arising from the master's negligence.

In *Klofski v. Railroad Supply Co.*, 235 Ill. 146, the court recognized the apparent confusion arising from the statement of the true rule as above, and the rule as sometimes stated, that the servant does not assume risks arising from the master's negligence, and in reconciling the authorities in this regard, said: "It will be found that the cases which exclude from the risks assumed by the servant such dangers as arise from the master's negligence are cases involving a consideration of the usual and ordinary hazards of the employment which are assumed by the original contract of hiring, and that the other line of cases which hold that the servant may assume dangers arising from the master's negligence are cases where the assumption of danger depends not upon the contract of hiring but upon the knowledge of the servant of the existence of danger." It was there further said: "If the servant

has, or by the exercise of reasonable care would have, knowledge of the existence of a particular danger and continues in the employment without complaint he will be deemed to have assumed the danger; and in respect to such dangers it is wholly immaterial whether they arise from the negligence of the master or from other causes. The master's negligence is not an ordinary and usual risk of the employment, hence the servant does not assume dangers arising therefrom by his contract of hiring, but the servant knowing of such negligence may assume it, and in such cases he assumes it because he knows of it, and not because it has become an ordinary risk."

In the case at bar appellant's assumption of the risks involved must be predicated upon his knowledge of appellee's alleged negligence in failing to equip the elevator platform with some appliance or guard and in permitting wet starch to be upon the platform, and appellant's knowledge of the dangers incident to the use of the elevator without such appliance or guard and with wet starch upon the surface of said platform, and upon his continuance in the employment of appellee without complaint or protest. Appellant at the time of his injury was of mature years and had had a varied experience in several departments of labor and in working with and about machinery. The absence of an appliance or guard upon the platform of the elevator and the danger incident to the use of the elevator without such appliance or guard was open and obvious to appellant, and he must be held chargeable with full knowledge both of the defect and of the danger. He also had like knowledge with respect to the presence of wet starch upon the surface of the elevator platform. It is not claimed on behalf of appellant that he made any complaint or entered any protest to any one sustaining the relation of vice-principal to appellee, with respect to the existing conditions. having full knowledge of the alleged defects and of the dangers incident thereto, and having continued in the

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employment of appellee without complaint or protest, appellant must be held to have assumed the risks, and the court did not err in giving to the jury a peremptory instruction to find appellee not guilty. The judgment will, therefore, accordingly, be affirmed.

Affirmed.

John M. Henderson, Appellee, v. Moweaqua Coal Mining & Manufacturing Company, Appellant.

STATUTE OF LIMITATIONS—*when amended count sets up new cause of action.* An amended count sets up a new cause of action where it differs from the original count in that under the count as originally filed it was necessary in order to recover that the plaintiff should prove the negligence of the defendant as charged and that he himself had not assumed the risk and was in the exercise of due care for his own safety, and under the count as amended it was incumbent upon the plaintiff to prove that his injury resulted from the wilful failure of the defendant to comply with some one or more of the provisions of the Mines and Miners Act and in the latter case the defense of assumed risk and contributory negligence were not available to the defendant.

Action in case for personal injuries. Appeal from the Circuit Court of Shelby county; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 17, 1908.

J. C. & W. B. McBRIDE, for appellant; JOHN RIDGELY, JR., and W. C. KELLY, of counsel.

CHAFEE & CHEW and S. S. CLAPPER, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellee against appellant to recover damages for personal injuries sustained by appellee on November 24, 1904, in the coal mine of appellant. A trial by jury in the Circuit Court of Shelby

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county resulted in a verdict and judgment against appellant for \$3,000. The original declaration filed by appellee on November 3, 1905, contained three counts. The first count alleges that appellant had contracted with the miners' union, of which appellee was a member, to furnish to the miners for use in the mine a certain kind of powder branded "C. C. C. Alton Powder," which powder was all large-grained and slow in combustion, said grains exploding so as not to greatly jar or disintegrate the roof of the room wherein the same was used, and that under such contract it became the duty of appellant to furnish to appellee said brand of powder for his use in the mine; that appellant, without notice to appellee, procured another and different kind of powder and negligently and wilfully furnished such other powder to appellee, and that appellee without knowledge of any change in the character of the powder, and while exercising due care for his own safety, used such powder so furnished to him and thereby caused the roof of his working place to be so affected that it thereafter fell upon him.

The second count alleges the same contract with reference to the brand of powder to be used in the mine, and further alleges an agreement between appellant and the miners' union that no change should be made in the character of the powder without the consent of appellee and the miners working in the mine; that not regarding its obligation in that regard, appellant, without the knowledge or consent of appellee and said miners, caused another and different kind of powder to be falsely marked and branded "C. C. C. Alton Powder," with intent to deceive appellee and said miners, and that appellee without knowledge of such change in the character of such powder, while exercising due care for his own safety, used the same, whereby the roof of his working place was so affected that it thereafter fell upon him.

The third count alleges that it was the duty of ap-

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pellant to have all places where men were expected to work in said mine carefully inspected and to cause to be marked upon the walls or roof of the said mine with a chalk mark that could be seen and understood a mark which would indicate the dangerous condition of such part of the mine, so that men working therein might notice the same and keep out of danger, and to cause a daily record of the condition of said mine to be made in a book kept for that purpose, and such record should be made in the morning before the miners descended into the mine; that appellant not regarding its obligations or duty in this behalf, did not cause the roof of the mine where appellee was engaged to be marked in any way to show that it was in a dangerous condition; that appellee while exercising due care and caution for his own safety and having no notice from the record required to be kept by appellant of the dangerous condition of the mine where he was about to engage at work and having no notice of any mark upon the ceiling or wall near where he was about to engage at work, although the roof of the room was then in a dangerous condition and the inspector might have discovered it if he had carefully performed his duties in that behalf, and while appellee was at work by reason of such defective roof and of there being no marks to warn appellee, the roof then and there fell upon appellee, etc. Thereafter appellee filed an additional count which alleged that appellant was operating a coal mine and that appellee was employed as a miner therein; that it was the duty of appellant to provide a proper and careful examination of said mine and to have sufficient mine examiners there employed so that the mine might be properly inspected and all places where men were expected to pass or work should be found to be in safe condition or any dangerous condition marked as indicated, and to cause a careful examination of the edges and accessible parts of recent falls and to cause all dangerous and unsafe places upon the walls or roof of the said mine to be marked as

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indicated, so that the dangerous and unsafe condition thereof could be seen and understood, and to cause a daily record of the condition to be made in a book for that purpose; that appellant *did not* provide sufficient competent mine examiners in the said mine to permit or allow a proper or careful examination of said mine or to allow reasonable inspection of all places in said mine where the men were expected to pass or to work, or to allow a proper observation of the condition of recent falls made in the mine or the roof and walls of the working places to be made; that on November 25, 1904, appellant procured a careless and negligent examination and inspection of said mine and the working parts thereof and the roof and walls thereof in the rooms and passageways therein to be made, and permitted and allowed inaccurate and false marks to be made in the roof and walls of said mine whereby a condition of safety appeared; that appellee relying upon the performance in a proper manner by appellant of its duty to inspect, examine and mark the mine as aforesaid, and while exercising due care and caution for his own safety, and the record of appellant not indicating any dangerous condition where appellee was about to work, and appellee having no notice of chalk marks on the roof or walls near the place where he was about to work, notwithstanding the roof of the mine at that place was then and there in a dangerous and unsafe condition, which dangerous and unsafe condition might have been readily discovered by due and reasonable inspection, and while appellee was engaged in his said employment, by reason of a defective and unsafe and dangerous condition of said roof, and for want of a careful examination and inspection thereof by appellant, and the failure of the appellant to mark such unsafe condition, the roof fell upon appellee, etc.

On November 13, 1907, appellee by leave of court amended the third count of his declaration by striking out the italicized words "*did not,*" appearing

therein after the word "behalf," and before the word "cause," and inserting in lieu thereof the words "wilfully failed to," and on the same day by like leave of court appellee amended his additional count by striking out the italicized words "did not" which appeared therein after the word "behalf" and before the word "provide," and inserting in lieu thereof the words "wilfully failed to."

To the third and additional counts as thus amended appellant filed its plea of the Statute of Limitations, averring that the cause of action alleged in said third and additional counts did not accrue to appellee within two years next before the filing thereof.

A demurrer interposed by appellee to said plea of the Statute of Limitations was sustained by the court and thereupon appellant elected to abide its said plea.

The third and additional counts of the declaration as originally filed charged appellant with common law negligence merely. They contained no reference whatever to the statute, a wilful failure to comply with the provisions of which gives a party injured the right to recover damages for such injury, and they contained no allegation that appellant had wilfully failed to comply with any provision of the statute. The breach of the several duties alleged some of which were imposed by statute and some of which had no reference to the statute, was the failure of appellant to carefully perform such duties. Both of those counts further alleged that appellee was in the exercise of due care for his own safety when he was injured. This allegation had no place in a declaration which predicated a right of recovery upon the wilful failure of a mine operator to comply with the provisions of the Mines and Miners Act.

The amendments to the third and additional counts of the declaration were made more than two years after the cause of action accrued, and as thus amended said counts of the declaration stated other and differ-

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ent causes of action from those which were alleged in said counts as originally filed. Under the counts as originally filed, it was necessary in order to recover that appellee should prove the negligence of appellant as charged and that he, himself, had not assumed the risk and was in the exercise of due care for his own safety; and under the counts as amended it was incumbent upon appellee to prove that his injury resulted from the wilful failure of appellant to comply with some one or more of the provisions of the Mines and Miners Act, and in the latter case the defenses of assumed risk and contributory negligence were not available to appellant.

When an amendment states a new or different cause of action than that which was originally stated, it is to be regarded as a new suit begun when such amendment is filed; and the Statute of Limitations may be pleaded in bar of the cause of action introduced by the amendment. *Heffron v. Rochester Ins. Co.*, 220 Ill. 514. In *Bradley v. Chicago-Virden Coal Co.*, 231 Ill. 622, it was held that a cause of action which predicated a right of recovery upon the wilful violation of the provisions of the Mines and Miners Act was different and distinct from a cause of action based upon a common law liability, and that such change in the cause of action affected by amendment was barred by the Statute of Limitations. In the case at bar the demurrer interposed by appellee to appellant's plea of the Statute of Limitations to the third and additional counts of the declaration as amended should have been overruled.

Even conceding that appellant failed to furnish a particular brand of powder and that it substituted therefor another and different brand of powder, as is alleged in the first and second counts of the declaration, and this concession is not warranted by the evidence, the evidence wholly fails to show that such conduct on the part of appellant was the proximate cause of the injury to appellee.

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Considering the evidence bearing upon that question as it appears in the record, most favorably for appellee, it tends to show that in May, 1904, a committee of the Miners Union made complaint on behalf of the miners employed in the mine, to the superintendent of appellant in regard to the powder then used in the mine; that the powder then in use in the mine was known as "C. C. Alton Powder," and the objection urged to its use was that it was too fine and that the shots fired by it did not produce sufficient lump coal; that appellant's superintendent told said committee he would furnish any kind of powder which would produce the best results in that regard, and proposed to the committee that he would send for Louis Berner, the traveling salesman of the Equitable Powder Co. at Alton, for a conference upon the subject; that upon the arrival of said Berner at the mine, he had a conference with the committee and that said committee thereafter visited the powder works at Alton and inspected the various brands of powder manufactured by the company; that the committee there selected a powder branded "C. C. C," as being best suited to produce the desired results, and took a keg of said powder to the mine for the purpose of testing the same; that said powder was tested by the committee in competition with another brand of powder and was selected by said committee for use in the mine; that in pursuance of the request of said committee, appellant ordered and furnished to the miners for use in the mine the powder branded "C. C. C."; that said powder although thus branded was not all of the same grade, some of the kegs containing a finer grade of powder than the original sample; that in the latter part of October, 1904, a committee of the miners again called upon the superintendent of appellant and complained that the powder was a finer grade than it should be, and at the suggestion of the superintendent, several of the kegs of powder stored in the magazine and branded "C. C. C." were opened and examined

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and found to contain a finer grade of powder than the original sample; that it was then agreed between said committee and said superintendent that after the stock of powder then on hand was exhausted, efforts should be made to procure a more uniformly coarse grade of powder; that prior to firing the shot which loosened the slate in the roof of appellee's working place he said to appellant's superintendent with reference to the powder branded "C. C. C.," which he was then using, that he would carry it back out to him, and the superintendent replied that if he (appellee) carried it out he would carry it back.

The evidence shows conclusively that the powder branded "C. C. C." was selected by a committee of the Miners Union of which appellee was a member, and that appellant procured the powder so selected, and was not in any way responsible for the fact that the powder was not of uniform grade.

It is further conclusively established by the evidence that the objection to the powder was not based upon any claim that its use was attended with greater danger to the miners, but that the sole ground of the objection to its use was that it did not produce sufficient lump coal. The fact that the fine grade of powder fires more rapidly and is more liable to disintegrate the roof of a working place in a mine than a coarse grade of powder is a mere incident in the case, which, under the evidence, cannot be held to have had any relation as an approximate cause of the injury to appellee.

In view of what has been heretofore said it is unnecessary to consider the various objections urged by appellant to the instructions given to the jury at the instance of appellee. It is sufficient to say upon this subject that even if the third and additional counts to the declaration were proper to be considered in the case, many of the instructions so given are erroneous and would necessarily require a reversal of the judgment.

Kolp v. Decatur Ry. & Light Co., 145 App. 645.

The judgment of the circuit court will be reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

Charles L. Kolp, Administrator, v. Decatur Railway & Light Company, Appellant.

1. MASTER AND SERVANT—*when direction to servant does not fasten liability.* If a particular work which a servant is directed by his master to perform is within the scope of the general employment of such servant, the mere fact that the servant is directed by the master to do such work does not operate to absolve the servant from the assumption of the risk involved.

2. MASTER AND SERVANT—*duty to furnish safe place.* It is the duty of the master to exercise reasonable care to provide his servant with a reasonably safe place in which to work, and this duty being a continuing one, it necessarily involves upon the master the duty of reasonable inspection to see that the working place of his servant is maintained in a reasonably safe condition.

3. EVIDENCE—*what experts incompetent as to.* Where witnesses called as experts have properly expressed their opinions relative to questions involving expert knowledge of electricity, the instrumentalities by which it is communicated, conveyed and controlled, the manner in which these instrumentalities perform their several functions, the effect produced upon one coming in contact simultaneously with a wire charged with electricity and a grounded telephone wire, the jury are as well qualified as are such witnesses to determine whether or not a particular place is a dangerous place to work, and to permit such witnesses to give their opinions upon that question is to invade the province of the jury.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the May term, 1908. Reversed and remanded. Opinion filed November 24, 1908.

LE FORGEE & VAIL, for appellant.

WHITLEY & FITZGERALD, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellee against appellant to recover damages for wrongfully causing the death of appellee's intestate, Oscar S. Kolp. Upon the trial of the cause in the circuit court of Macon county the jury returned a verdict against appellant for \$4,250, upon which verdict the court entered judgment and this appeal followed.

The declaration contains six counts and charges in substance that appellant was the owner of and operated a certain electric light and power plant, and that the deceased was employed by appellant as a lineman; that upon a certain pole belonging to appellant it negligently permitted a large number of telephone wires to be attached; that certain electric wires were uninsulated and came in too close contact with the telephone wires on said pole; that a certain cut-off box attached to said pole was negligently allowed by appellant to become decayed, uninsulated and unsafe; that it then and there became the duty of appellant to exercise reasonable care to provide and maintain a reasonably safe and suitable place for the deceased in which to perform the work assigned to him, and to warn inexperienced employes of dangers not obvious to them at places where they might be required to work; that the deceased was inexperienced and ignorant of the dangers to which he might be exposed in working upon said pole; that a certain foreman of appellant negligently directed the deceased to go upon said pole and to perform certain work there, without warning the deceased of the dangers incident to the performance of such work; that in consequence thereof the deceased while so at work upon said pole and while in the exercise of due care for his own safety was necessarily brought into contact with said uninsulated wire and said cut-off and received a shock of electricity which caused his death.

The evidence tends to show that upon the day of the

accident which resulted in his death, the deceased was one of a gang of men employed under the directions of one Hornbeck, a foreman of appellant, in stringing wires and making certain connections with the electric wires and apparatus owned and operated by appellant; that upon one of the poles of appellant, a few inches below its top, was attached a cross-arm upon each end of which was strung a wire called a primary wire which, when charged with electricity, carried a current of about 2,280 volts; that about 4 feet below said upper cross-arm and at right angles therewith was another cross-arm upon which were strung four wires, viz., two primary wires, one at each end of said cross-arm, which wires when charged carried a current of 2,280 volts, and two secondary wires which when charged carried 110 volts; that the primary wires upon the two cross-arms were connected by cut-off or junction boxes, which were located upon the lower cross-arms; that the primary wires from both cross-arms entered at the bottom of said junction boxes, where they were connected by porcelain plugs inserted in the boxes; that when the plugs were inserted in the boxes the current of electricity in the primary wires upon the upper cross-arms was thereby communicated to the primary wires on the lower cross-arm, and when the plugs were withdrawn the connection between said primary wires was thereby cut off; that some time prior to the accident which resulted in the death of appellee's intestate, the plugs had been taken out of the boxes and the connection between the two sets of primary wires thereby broken; that there were two other cross-arms upon said pole, one being about four feet below the second cross-arm and one about 14 inches below the third cross-arm, upon each of which there were a number of wires owned and operated by a telephone company; that these telephone wires were grounded so that if a person came in contact simultaneously with such telephone wires and with any uninsulated portion of the primary wires on the cross-

arms above or with any uninsulated portion of said cut-off boxes, when the same were charged with electricity, a circuit would be completed through the body of such person sufficient to produce death.

The evidence further tends to show that the deceased entered the employment of appellant on August 31, 1907, and worked in the capacity of a groundman until September 19th following, when he was promoted to the position of lineman and was working in that capacity when he was killed on October 5, 1907; that for several years prior to his employment by appellant the deceased had been employed by a telephone company as a lineman; that about fifteen minutes before the accident which resulted in his death, the deceased was directed by Hornbeck, the foreman of appellant, to take a couple of plugs and insert them in the cut-off boxes, heretofore mentioned, in order to make the connection between the two sets of primary wires; that for the purpose of complying with such direction the deceased climbed the pole by means of spurs with which he was equipped; that shortly after he ascended the pole and after he had inserted a plug in one of the cut-off boxes, he fell to the ground and died within a few minutes thereafter. An examination of the person of the deceased immediately after he fell disclosed burns produced by electricity on the forefinger of his left hand and on his left leg below the knee which indicated that he had come in contact simultaneously with the grounded telephone wires and with some portion of the cut-off box or the primary wires leading into it. There was evidence tending to show that the deceased had climbed a pole and inserted a plug in a cut-off box on the day preceding his death; that when the deceased ceased work as a groundman he applied for the position of lineman and told the superintendent of appellant that he had had three years' experience as a lineman; that when the foreman of appellant directed the deceased to climb the pole, he told the deceased to be careful not to take hold of the wires.

There is also evidence tending to show that the insulation upon the primary wire on the upper cross-arm was decayed and hanging in strips and that some portion of the primary wire near to and leading into one of the cut-off boxes was uninsulated; that one of the telephone wires on the lower cross-arm presented the appearance of having burned flesh upon it; that the cut-off boxes were of a standard pattern and such as were commonly used for the purpose.

Appellee's theory as to the cause of the death of his intestate, is that the cut-off box was so worn that it afforded inadequate or imperfect insulation from the high tension current running into it, or that the primary wires entering into said cut-off box at a point near said box were uninsulated, so that when the deceased was in contact with the grounded telephone wires upon the lower cross-arm a current of electricity was carried through his body.

Appellant's theory of the case is that the deceased in inserting the plug in the cut-off box carelessly extended the forefinger of the hand with which he grasped the plug above the flange, which protected the handle below in such manner that the finger was thrust into the interior of the cut-off box when the plug was inserted, and that the shock which caused his death was occasioned by the end of his finger coming in contact with some of the metallic apparatus on the inside of said box.

The argument of appellant here is mainly directed to a criticism of the action of the trial court in refusing to give to the jury any of the instructions tendered upon its behalf purporting to declare the law governing the doctrine of assumed risk as applied to the facts in the case which there was evidence in the record tending to prove.

It is insisted by appellee that the doctrine of assumed risk is not involved in the case because the declaration alleges and the uncontroverted evidence discloses that the deceased at the time of his death

was engaged in performing a duty specifically imposed upon him by the direction of appellant's foreman, and an examination of the record suggests that the trial court adopted the theory of appellee in this respect.

It must be conceded that the several allegations in the declaration, that the deceased was inexperienced in the duties of a lineman and of the danger incident to the performance of such duties, that appellant had knowledge of the inexperience of the deceased in that regard, that the alleged dangerous conditions existing at the place where the deceased was directed to work and the risk involved in performing such work was unknown to the deceased and could not have been ascertained by him by the exercise of ordinary care, negative the deceased's assumption of the risk involved in doing the work, but the evidence bearing upon the several issues of fact is conflicting and the determination of such issues was for the jury under proper instructions.

If the particular work which a servant is directed by his master to perform is within the scope of the general employment of such servant the mere fact that the servant is directed by the master to do such work, does not operate to absolve the servant from assumption of the risk involved, and our attention has not been called to any case which announces a contrary doctrine. If the rule contended for by appellee is the true rule, the mere direction by a carpenter's foreman to one employed to do general carpenter work, to frame a portion of a building, or to construct a scaffold or to shingle a roof or to hang a door would operate to absolve such workman from assumption of the risk involved in doing that particular work. Numerous like illustrations involving particular work done by tradesmen and laborers by the direction of one in general charge of the work might be cited. The adoption of such a rule would practically result in the abolishment of the doctrine of assumed risk as it now

exists in this state. Among other cases in which a direction by the master to a servant to perform particular work within the general scope of the servant's employment has not operated to absolve the servant from assumption of the risk involved in doing such work, are the following: *Ill. Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243; *Montgomery Coal Co. v. Barringer*, 218 Ill. 327; *McCormick Harv. Co. v. Zakzewski*, 220 Ill. 522. The language of the court in *Republic Iron Co. v. Lee*, 227 Ill. 246, is pertinent to the question of assumed risk arising under the facts of the case at bar. It is there said: "An exception to the doctrine of assumed risk exists where a servant is ordered by his master to do certain work which is attended with danger of which he is not fully cognizant, and he relies upon the order to do the work as an assurance that he may safely perform the task. It is only where the servant has been misled by the order of the master that the exception exists."

There is evidence in this case tending to show that the specific work which the deceased was directed to perform was within the general scope of his duties as a lineman; that he was experienced in the duties of his employment; and that the defects, if any, and the dangers incident thereto, in connection with the work which he was performing immediately before his death were open and obvious, or that he could, by the exercise of ordinary care, have had knowledge of the same.

The 12th, 13th, 14th, 15th and 17th instructions offered by appellant were refused by the court and the action of the court in this regard is assigned as error. All of these instructions relate to some phase of the law governing the doctrine of assumed risk. We do not deem it now necessary to analyze and discuss these several refused instructions in detail. While each of said instructions, except the 13th, is subject to some objections which may have occasioned its refusal by the trial court, the 13th instruction states a correct

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rule of law governing the doctrine of assumed risk as applicable to the facts in the case, and it was error to refuse the same.

It is urged on behalf of appellant that the 10th instruction given at the instance of appellee is erroneous, because it imposes upon the master the duty to inspect the place where he puts his servant to work, to see that his servant is not exposed to unusual dangers. It is the duty of the master to exercise reasonable care to provide his servant with a reasonably safe place in which to work, and this duty, being a continuing one, it necessarily involves upon the master the duty of reasonable inspection to see that the working place of his servant is maintained in a reasonably safe condition. The phraseology of the instruction in the particular referred to is not altogether free from criticism, but taken in connection with the latter clause of the instruction we do not think it was so harmful to appellant as to require a reversal of the judgment upon that ground.

The witnesses Jordan and Mitchell called to testify on behalf of appellee, after describing in detail the office and position of the wires and apparatus upon the pole, and the precise manner in which danger was to be apprehended by a person working on said pole, were permitted to state that in their opinion the pole as thus equipped was a dangerous pole. This was error. These witnesses, called as experts, having properly expressed their opinions relative to questions involving expert knowledge of electricity, the instrumentalities by which it is communicated, conveyed and controlled, the manner in which these instrumentalities perform their several functions, the effect produced upon one coming in contact simultaneously with a wire charged with electricity and a grounded telephone wire, the jury were as well qualified as were the witnesses, to determine whether or not the pole as equipped, was a dangerous place to work, and the opinions of the witnesses upon that question infringed

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the province of the jury. Yarber v. C. & A. Ry. Co., 235 Ill. 589.

We do not consider the other objections urged of sufficient importance to merit further discussion. For the errors indicated the judgment of the circuit court will be reversed and the cause remanded.

Reversed and remanded.

F. R. Carter et al., Appellees, v. Cairo, Vincennes & Chicago Railway Company, Appellant.

1. MEASURE OF DAMAGES—*in action for failure to drain pursuant to contract.* In an action by the owner of a leasehold interest in a mine to recover damages for the failure to drain pursuant to contract so that such mine was flooded, the correct measure of damages is the cost of the restoration of the mine to its condition before it was flooded, providing such cost does not exceed the fair cash market value of the plaintiff's leasehold right for the unexpired term, and in the event that such cost of restoring such mine to its condition before the breach of the contract exceeds the fair cash market value of the plaintiff's leasehold right at the time of such breach, the plaintiff is only entitled to recover the fair cash market value of his leasehold right.

2. EVIDENCE—*when witness competent to estimate cost of repairs.* Held, that the witnesses in this case had sufficiently qualified to justify the court in permitting them to give their opinions as to the proper cost of restoring a mine to its condition prior to its being flooded.

3. EVIDENCE—*when profits may be shown.* It is competent to permit evidence of profits earned in the conduct of a mine under a leasehold interest where such evidence is limited to the purpose of showing merely that the leasehold interest had some value.

Assumpsit. Appeal from the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1908. Affirmed. Opinion filed November 24, 1908.

JAMES VAUSE, JR., and REARICK & MEEKS, for appellant.

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O. M. JONES and LINDLEY, PENWELL & LINDLEY, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit in assumpsit by appellees against appellant to recover damages for the alleged breach of a contract entered into between the parties on July 8, 1905. The said contract recites that, whereas, appellees hold a lease of certain coal lands in Vermilion county, Illinois, of the Danville Consumers Coal Company; and, whereas, appellant desires to locate its right of way over and across said lands and to construct and operate its railroad thereon; and, whereas, each of said parties will be benefited by the location of said right of way by appellant and the construction and operation of said railroad; and, whereas, said parties mutually desire to make an amicable settlement of all matters pertaining thereto, and in consideration of the payment by appellant to appellees of the sum of \$1,350 cash in hand, it is mutually agreed in substance, as follows:

1. That appellant shall have the right to enter immediately upon said lands for the purpose of constructing its said railroad.

2. That appellant shall provide and maintain a permanent drain extending from the south of the present entry to the mine of appellees on the premises, easterly to the limits of the embankment of appellant, and also provide and maintain a ten-inch tile drain extending from the east end of said cast iron pipe, northerly along the bed of the new ditch to be constructed by appellant, to a point opposite Wilkinson's scale house.

3. That appellant shall remove from its right of way the blacksmith shop, scale and scale house, tipple track, brick from the air shaft and other movable property thereon belonging to appellees to some convenient, practicable point to be designated by appellees. The declaration alleges performance of the contract on the

part of appellees and that appellant has not provided and maintained a permanent drain consisting of a ten-inch cast-iron pipe and a ten-inch drain tile as required by clause 2 of said contract, and that in consequence of such breach of said contract by appellant the mine of appellees on said premises has not been drained but has been flooded and rendered wholly untenable and unusable to the damage of appellees, etc.

A trial by jury in the circuit court of Vermilion county resulted in a verdict and judgment against appellant for \$1,500.

When the contract in question was made appellees were operating a coal mine by means of a drift or slope which extends into a bluff from the east side thereof. The main drift or entry ran into the bluff in a westerly direction a distance of 700 to 800 feet and from said main entry or drift two lateral entries or drifts were driven in a southerly direction a distance of about 300 feet. The mouth of the main entry or drift was on the east side of the bluff and the mine was drained by gravity by means of the tile drains and open ditches to the mouth of said main entry and thence east and north into one or more ravines. The construction of appellant's railroad required the building of an embankment from 30 to 50 feet in height immediately above or adjacent to the mouth of the main entry, and the contract required appellant to provide and maintain a permanent drain, consisting of a ten-inch cast-iron pipe, to extend from the mouth of the said entry easterly through the said embankment of appellant, and a ten-inch tile drain to extend from the east end of said cast-iron pipe northerly along the bed of a new ditch to be constructed by appellant, whereby the water in appellees' mine might continue to be drained by gravity. Shortly after making the said contract appellant commenced the construction of its railroad and caused a trench about 2½ feet in depth to be dug from a point some distance from the mouth of the mine entry westward to the mouth of the said entry, in

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which trench were laid six or seven lengths of ten-inch cast-iron pipe. Thereafter appellant made the fill for its said embankment which embankment, when completed, entirely covered up the east end of said cast-iron pipe to a depth of from 15 to 20 feet. No further effort was made by appellant to comply with the provisions of said contract with reference to providing a drain until after the commencement of the suit in July, 1907. As to the character and efficiency of the work then done by appellant in an effort to comply with the requirements of said contract there is a sharp conflict in the evidence.

The evidence offered on behalf of appellant tends to show that upon complaint made to it by one of the appellees that the drain tile had not been laid and connected with the cast-iron pipe as required by the contract, it sank test holes into the embankment for the purpose of locating the east end of the cast iron pipe; that after the same was located, it laid the ten-inch drain tile from Wilkinson's scale house to the end of said cast-iron pipe and connected said pipe and said drain tile by means of a large wooden box.

The evidence introduced on behalf of appellees tends to show that the tile drain which was then laid by appellant was not in fact connected with the cast-iron pipe which had been laid by appellant in the first instance and covered by the embankment, but that said drain tile was connected with the cast-iron pipe which was subsequently laid by appellant some distance east of the end of the pipe which was covered by the embankment; and that the joint of cast-iron pipe last laid by appellant was connected, if at all, at its west end with an old tile drain which had formerly served to drain appellees' mine. However this may be, it is uncontroverted that the water in appellees' mine ceased to drain therefrom after the construction of appellant's embankment and that said mine was then thereby flooded and has since so continued to be flooded. Some time after the construction

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of appellant's railroad appellees drove a new entry into the side of the bluff a distance of about 50 yards north of the mouth of the old entry and mined coal therein until January, 1908, when a shot fired in said new entry blew a hole through into the old entry and the water therefrom ran into said new entry. No damages were claimed or allowed to appellees for any injury resulting to the new entry.

In proof of their tenure appellees introduced in evidence, together with the indorsements thereon, a written lease dated September 5, 1903, of the real estate upon which said mine was located from the Consolidated Coal Company of St. Louis, the then owner of the fee, to the appellees, F. R. and W. B. Carter, for the term of twelve months beginning October 1, 1903, whereby said lessees were given the right to dig, mine, remove and dispose of the coal in the seam known as the Danville Seam, from a drift-working located in the west side of a ravine, west of the old Paris and Danville Railroad grading and south of the drift then worked by one Wilkinson. Said lease further provided that the lessees should pay to lessor as rent or royalty on or before the fifth day of each month, 11 $\frac{1}{4}$ cents per ton on each and every ton of mine run coal, mined during the preceding calendar month, and that in no case should any payment be less than \$15 for each of the months from September to April inclusive, and \$7.50 for each of the months from May to August inclusive, whether the actual coal mined during the said months at the said rate should equal such amount or not.

Appellees also offered in evidence the record of a deed bearing date January 1, 1904, from the Consolidated Coal Company to one L. E. Fischer, conveying the real estate described in said lease, and also offered in evidence a deed to said premises dated October 12, 1904, from Louis E. Fischer and wife to the Danville Consumers Coal Company. The said lease bore a

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written indorsement signed by L. E. Fischer, renewing the same for a period of five years from the date of its expiration, and also a further written indorsement under date of September 1, 1904, whereby the appellees, W. B. and F. R. Carter, assigned a one-third interest therein to the appellee, J. M. Carter, and thereby designated said lease and all interest therein as the property of Carter Brothers, a co-partnership consisting of the appellees.

It is not controverted by appellant that there was a breach by it of that provision of the contract which required it to provide and maintain the iron pipe and tile drain, whereby the mine operated by appellees might be drained, but it is insisted that a clear preponderance of the evidence tends to show that a performance of the said contract in that particular was waived by the appellee, J. M. Carter. The evidence bearing upon this issue is conflicting and might reasonably support a finding for either party, but we are unable to say that appellant established a waiver as claimed by a clear preponderance of the evidence. Upon this issue the verdict of the jury must be held in this case to be decisive.

Conceding, for the sake of the argument, that the record of the deed from the Consolidated Coal Company to L. E. Fischer was improperly admitted in evidence, because no proper foundation was laid for the admission of said record as secondary evidence, its admission was not harmful to appellant. It appears from the evidence that the Danville Consumers Coal Company at the time it purchased the real estate from Fischer had actual knowledge of the terms of the lease of said premises by the Consolidated Coal Company to appellees and of the extension of such lease by Fischer, and had collected from appellees the royalties and rents under the said lease.

The Danville Consumers Coal Company was, therefore, bound by the terms of the said lease and the recital in the contract sued on, that the appellees held a

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lease of the premises from the Danville Consumers Coal Company operates to estop appellant from denying that the said lease was binding upon the Danville Consumers Coal Company and from contesting the rights of the appellees under said lease.

By the terms of the lease appellees had a certain fixed tenure of the premises. They were bound to pay a certain royalty upon all coal mined, and in any event they were bound to pay a certain monthly rental during the term of the lease. The trial court determined the correct measure of damages for the breach of the contract to be the cost of the restoration of the mine to its condition before it was flooded, providing the cost of such restoration did not exceed the fair cash market value of appellees' leasehold right, for the unexpired term, and in the event that the cost of restoring said mine to its condition before the breach of the contract exceeded the fair cash market value of appellees' leasehold right at the time of such breach, that appellees were only entitled to recover the fair cash market value of their said leasehold right. The rule so announced by the trial court as to the proper measure of damages in the case at bar was correct. *Kankakee & Seneca R. R. Co. v. Horan*, 22 Ill. App. 145; *Kellyville Coal Co. v. O'Connell*, 134 Ill. App. 311.

It is urged that the witnesses John M. Carter and John O'Connell were not qualified to testify to the probable cost of restoring the mine to its former condition, or to the fair cash market value of appellees' leasehold right in the mine. Carter testified that he had been engaged in the business of coal mining for ten years; that after the breach of the contract by appellant there was no means by which the mine could be drained except by installing a pump of large capacity; that he was familiar with the price of mining pumps and the cost of operating the same; that he was familiar with the method of timbering required to properly support the roof of a mine which had been flooded with water and with the cost of such timbering, and that he

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was familiar with the fair cash market value of coal lands and of leaseholds in coal lands.

The witness O'Connell testified that he had been a coal mine operator since 1891; that he knew the mine in question and had examined it; that he was acquainted with the value of coal lands and with the fair cash market value of leasehold interests in coal lands in the vicinity of the mine in question. It was established by the testimony of these witnesses that the probable cost of restoring the mine to its former condition was from six to ten thousand dollars, and that the fair cash market value of the leasehold interest of appellees in said mine was from \$4,000 to \$10,000. The witnesses appear to have been qualified to testify in respect to the matters inquired of and the court did not err in permitting them to so testify. The weight to be given their testimony was a question for the jury. As to the cost of restoring the mine to its former condition and as to the fair cash market value of appellees' leasehold interest in said mine appellant introduced no countervailing evidence.

It is urged that the witness Carter was improperly permitted to state that the profit on the coal mined by appellees during the time the mine in question was operated by them was 75 cents per ton. This testimony was expressly limited by the court to stand as tending to show that the leasehold interest of appellees in the mine had some value. Appellees did not attempt to show the quantity of coal which had been mined by them or the probable amount of coal then in place in the mine, and the limited purpose for which the evidence complained of was admitted could not have operated to the prejudice of appellant.

The instructions given by the court, taken as a series, state the law applicable to the case with substantial accuracy, and the instructions given at its instance are as favorable to appellant as the most liberal construction of the rules invoked by them would permit. The amount of damages awarded to appellees by the

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jury is clearly within the range of the competent evidence in the record upon that issue.

There is no error in the record prejudicial to appellant and the judgment of the circuit court will be affirmed.

Affirmed.

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